Supreme Court, U. S.
FILED
JUN 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197_____

NO. 77-1749

IRENE PEREZ,

Petitioner

VS

CHARLES R. BORCHERS, INDIVIDUALLY AND AS DISTRICT ATTORNEY IN AND FOR THE 49TH JUDICIAL DISTRICT OF TEXAS, ET AL

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. G. Hornberger
J. G. Hornberger, Jr.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Petitioner

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 3 |
| Questions Presented for Review | 3 |
| Constitutional and Statutory Provisions Involved | 4 |
| Statement of the Case | 9 |
| Basis for Federal Jurisdiction in District Court | 18 |
| Reasons for Granting the Writ | 18 |
| Argument | 19 |
| Summary | 28 |
| Certificate of Service | 30 |

Appendix:

| | |
|---|---|
| Opinion of United States Court of Appeals | App.-1-7 |
| Order Denying Motion for Rehearing | App.-8 |
| Plaintiff's Original Complaint (Without Exhibits) | App.-9-49 |


Table of Contents-
Appendix-cont'd


| | Page |
|---|---|
| Amended Motion to Dismiss of Borchers, Ramos, Whitworth and Trigo | App.50-54 |
| Motion to Dismiss of Francisco J. Flores | App.54-56 |
| Motion to Dismiss of Carlos M. Zaffirini | App.56-58 |
| Motion to Dismiss of A. A. Alvarado | App.58-63 |
| Motion to Dismiss of Arturo Villarreal | App. 63-65 |
| Orders of Dismissal | App. 66-70 |

## TABLE OF CASES AND OTHER AUTHORITIES


Page

Cases:

Fulton v Emerson Electric,
420 F2 527 ---------- 27

Gomez v Florida State Emp. Comm.
417 F2 569 ---------- 27

Hall v Garson,
430 F2 430 ---------- 27

Hampton v City of Chicago
484 F2 602 ---------- 20

Hilliard v Williams
465 F2 1212 ---------- 22

Imbler v Pachtman
96 S Ct 984, 47 L Ed2d 128 --------- 23

Lewis v Brautigam,
227 F2 124 ---------- 23

Mullen v Fitzsimmons, et al
172 F2 601 ---------- 19

Pierson v Ray,
386 US 547, 18 LEd2d 288 ---------- 24

Pitt v Coxe
65 FRD 355 ---------- 25





Cases-cont'd Page

Robichaud v Ronan
351 F2 533 ---------- 25

Smyl, Inc. v Gerstein
364 FS 1302 ---------- 21

U.S. v Price
383 US 787, 16 L Ed2d 267 --------- 26, 27

U.S. v Shubert,
348 US 222 ---------- 19

Other Authorities:

Art. 1, Section 10, Texas Constitution -- 4

Art. 1, Section 19, Texas Constitution -- 5

5th Amendment to the Constitution of the United States ---------- 5

14th Amendment to the Constitution of the United States ---------- 6

Art. 15.17 of Texas Code of Criminal Procedure ---------- 7

Art. 16.01 of Texas Code of Criminal Procedure ---------- 8

2 Moore's Fed. Practice 2d Ed. 2257 --- 19

42 USCA Sec. 1983 and 1985 ---------- 28

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 197____

_____

NO. _____

_____

IRENE PEREZ,

PETITIONER

VS

CHARLES R. BORCHERS, INDIVIDUALLY AND AS DISTRICT ATTORNEY IN AND FOR THE 49TH JUDICIAL DISTRICT OF TEXAS, ET AL

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---



The Petitioner, Irene Perez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 2, 1978; and to the order of that court dated March 6, 1978, denying the Petitioner's Petition for Rehearing.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which appears at pages 1 thru 7 of the Appendix is reported at 567 F2 285. The District Court wrote no opinion, but merely granted the Motions to Dismiss. The orders of dismissal are reproduced at pages 66 thru 70 of the Appendix. The order denying the Petition for Rehearing in the United States Court of Appeals appears on page 8 of the Appendix.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. pp. 1 thru 7) was entered on February 2, 1978. A timely Petition for Rehearing was denied on March 6, 1978. The jurisdiction of this Court is invoked under the provisions of 28 USC Section 1254.

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Courts below err in granting the motions to dismiss of all of the defendants when such judgments of dismissal were based solely on the pleadings on file? (Since the Plaintiff's Original Complaint is attached hereto on pages 9 thru 49 of the Appendix, the allegations thereof on which this Petition for Certiorari is based are not repeated here).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10 of the Texas Constitution:

"Sec. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no

person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. As amended Nov. 5, 1918."

Article 1, Section 19 of the Texas Constitution:

"Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous,crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval



forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States:

"Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 15.17 of the Texas Code of Criminal Procedure:

"In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not



required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law. Acts. 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1736, ch. 659, Sec. 12, eff. Aug. 28, 1967."

Article 16.01 of the Texas Code of Criminal Procedure:

"When the accused has been brought before a magistrate for an examining trial that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent an accused in such examining trial only, to be compensated as otherwise provided in this Code. The accused in any felony case

case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722."

## STATEMENT OF THE CASE

The Petitioner, Irene Perez, is a former Deputy Tax Assessor-Collector of Webb County, Texas. On February 3, 1977, a complaint against the Petitioner was signed and sworn to by Texas Ranger Ramiro Martinez charging this Petitioner with official misconduct under the provisions of Section 39.01 (a) (5) of the Penal Code of Texas. This complaint was filed with the Respondent, A.A. Alvarado, who is now and at all times pertinent herein was the duly elected, qualified and acting Justice of the



Peace in and for Precinct No. 1, Place No. 2 of Webb County, Texas. At that time and at all times pertinent herein, the defendant-Respondent, Charles R. Borchers was and is the duly elected, qualified and acting District Attorney for the 49th Judicial District of Texas, which district includes Webb County, Texas, in which County the City of Laredo is located. Also at that time, and at all times pertinent herein, the defendants-Respondents, Donato Ramos, Steve A. Whitworth and Sharon S. Trigo, were the duly appointed qualified and acting Assistant District Attorneys for the said 49th District of Texas. Also at that time and at all times pertinent herein the defendant-Respondent, Francisco J. Flores, a duly and legally licensed and practicing attorney in Webb County, Texas, was and is the duly elected qualified and acting County Tax Assessor-Collector of Webb County, Texas. Also at that time and

at all times pertinent herein, the defendant-Respondent, Arturo Villarreal, was the duly appointed, qualified and acting Deputy County Tax Assessor-Collector of Webb County, Texas. Also at that time and at all times pertinent herein, the defendant-Respondent, Carlos M. Zaffirini, a duly and legally licensed and practicing attorney of Webb County, Texas, was and is the retained counsel for the defendant-Respondent, Francisco J.Flores.

For a period of approximately ten (10) years prior to the 26th of January, 1977, the Petitioner was an employee of the Tax Assessor-Collector of Webb County, Texas, and on January 26, 1977, she was suspended with pay from her position. On February 1, 1977, her employment was terminated.

On February 3, 1977, the petitioner appeared with her attorneys in the office of the Respondent, A.A. Alvarado, bond was set at



$20,000.00, and she was remanded to the custody of the Sheriff of Webb County.

Pursuant to a setting by the respondent, A.A. Alvarado, an examining trial was held by the defendant-respondent, Alvarado, in the 111th District Courtroom on February 21, 1977. Present were the District Attorney, Charles R. Borchers, and his assistant, Donato Ramos, Carlos M. Zaffirini, acting as counsel for the Respondent, Francisco J. Flores, the Petitioner, Irene Perez, and her attorneys, J. G. Hornberger and J.G. Hornberger, Jr. After the State had placed its first witness, Ramiro Martinez, on the stand and he had completed his testimony, the Plaintiff-Petitioner moved to dismiss the complaint for lack of evidence. The motion was denied and the Petitioner then offered to produce evidence in her own behalf. At the request of the Respondent, Charles R. Borchers, the

defendant, A. A. Alvarado, refused to permit the petitioner to present evidence on her behalf. The plaintiff then requested that she be allowed to perfect her bill of exceptions which she was in part allowed to do but only after the defendant, A. A. Alvarado, had excused all of the witnesses from the rule, which rule had been invoked by the Plaintiff at the inception of the trial.

On the 3rd day of March, 1977, this suit was filed by the plaintiff under the Civil Rights Act, Title 42, Sections 1983, 1985, 1986 and 1988 against each of the defendants, individually as well as in their official capacity. She alleges first that each of the defendants (Respondents) acting under the color and pretense of the statutes, ordinances, regulations,customs and usages of the State of Texas, and purporting to act under the color and authority of their office with malicious intent subjected or caused to be



subjected the petitioner to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit:

1. The right not to be deprived of life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Constitution of the United States.

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property, without due process of law;

and to cause her great mental and physical injury; and knowing that there was not sufficient evidence to cause a complaint to be issued against the Petitioner, the said respondent, Charles R. Borchers, in a determined effort to protect and assist the respondent, Francisco J. Flores, and

his counsel, the respondent, Carlos M. Zaffirini, as well as the respondent, Arturo Villarreal, and other persons, and to cause the general public to believe that the petitioner was solely responsible for an alleged shortage of money in the office of the Tax Assessor-Collector of Webb County, Texas, the said respondent, Charles R. Borchers, maliciously and without foundation therefor, and without causing an audit to be made of the office of the Tax Assessor-Collector, caused the said Ranger Ramiro Martinez, to sign, swear to and file with the respondent, A.A. Alvarado, purporting to act as Justice of the Peace, the complaint, thereby causing her to be incarcerated until the required bond was made. The conduct and acts of the respondent, Borchers, at the said examining trial, all as are hereinbefore set forth, still acting under the color of his office, were also taken to deprive the plaintiff of her Constitutional



rights hereinbefore set forth. The Petitioner further alleges that it is a fact that in performing the acts above set forth the respondent, Charles R. Borchers, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity other than his quasi-judicial capacity; further the said respondent, Borchers, in performing said acts was not discharging his official duties, was not acting in his official capacity, and was not in the performance of an integral part of the judicial process. The plaintiff further alleges that the said respondent, Borchers, acted in bad faith and without hope of obtaining a valid conviction but only to protect other persons. Essentially the same allegations are made as to the respondent, A.A. Alvarado. The Petitioner further alleges that all of the respondents intentionally conspired and entered

into a conspiracy for an unlawful purpose, to-wit, the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Texas with the intent to deny to the Petitioner, a citizen of the United States and of the State of Texas, the equal protection of the laws, and particularly to deny her the right not to be deprived of the rights of life, liberty or property without due process of law, in violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. The petitioner alleged with particularity the purposes of the conspiracy and then sets forth also with particularity 13 overt acts committed by the respondents. The Petitioner asks for actual and exemplary damages.

The respondents, Borchers, Ramos, Whitworth and Trigo, of the District Attorney's office, filed a joint Motion to Dismiss and each



of the other respondents filed on his own behalf a Motion to Dismiss. All of the motions were granted.

## BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

Jurisdiction of the District Court was based on the provisions of 28 USC Sections 1331 and 1343.

## REASONS FOR GRANTING THE WRIT

The pleadings on file conclusively show that the rights of the Petitioner granted to her by the Constitution of the United States and the State of Texas were violated by the respondents, and under the facts alleged, the respondents are not entitled to immunity.

## ARGUMENT

In United States v Shubert, 348 US 222, the Supreme Court, speaking through Mr. Chief Justice Warren, stated:

> "The allegations of the complaint, on a motion to dismiss, must of course be taken as true."

In Mullen v Fitzsimmons, et al, 172 F2d 601 (7th Cir., 1948, Cert. Denied), the Court stated:

> "We assume that the foregoing is also a fair statement of the issues presented to the District Court in support of the motions to dismiss the actions. In our opinion, they completely mistake the functions of the motion to dismiss for failure to state a claim. As stated in 2 Moore's Federal Practice, 2d Ed., par. 12.09 at p. 2257, 'The motion to dismiss for failure to state a claim raises matter in bar



and, if sustained without leave to plead further, results in a judgment on the merits.' It has therefore generally been held that a complaint should not be dismissed for insufficiency, for failure to state a cause of action, unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."

In Hampton v City of Chicago, et al, 484 F2d 602, 7th Cir., 1973, the Court stated in part:

> "The complaints allege that as a direct result of the conspiracy, the unfounded prosecution was continued until May 8, 1970, and plaintiffs incurred expenses in preparing their defense. The conspiracy charge is somewhat tenuous since it merely alleges that 'some or all' of the defendants participated, and the causal connection between the conduct of several

appellees and the alleged injury to plaintiffs is doubtful at best. Nevertheless, serious allegations of conspiracy have been made, and matters such as the extent of injury and causal connection raise questions for the trier of fact. Since we cannot say with certainty that there is no possibility that any set of facts which might be proved in support of the allegations would entitle one or more of the plaintiffs to some relief, it was error for the district court to enter judgment finally disposing of the claims against these defendants.

If the alleged conspiracy did exist, as we must assume at this stage of the case, and if it did prolong a completely unfounded prosecution, plaintiffs are entitled to relief against each conspirator."

In Smyl, Inc. v Gerstein, 364 FS 1302, D.C. Florida, 1973, the Court stated:



"The claim for damages against the State Attorney, Gerstein, and his assistants, Rivkind and Schwarz, must likewise be dismissed, Each defendant has been sued in his official capacity as a prosecutor. The complaint does not contain any allegations that they personally acted outside of the scope of their jurisdiction or in a manner not authorized by law. Consequently, the defendants, Gerstein, Rivkind and Schwarz are immune from damages."(Underlining ours).

In Hilliard v Williams, 465 F2d 1212, 6th Cir., 1972, the Court stated:

"However, the immunity of a prosecuting attorney from civil liability is not absolute:

'(A) quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office.'

Lewis v Brautigam, 227 F2d 124, 129 (5th Cir. 1955)."

In support of their position, the District Attorney and his Staff cite as the leading case in point, Imbler v Pachtman, 96 S Ct 984, 47 L Ed 2d 128, decided by the Supreme Court of the United States on March 2, 1976. It is apparent that this case did not change the law, but only sets it out more clearly than had been the case prior to the decision. The entire holding is basically set forth in Paragraph (1a) of the opinion of Mr. Justice Powell, which reads as follows:

"The question presented in this case is whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 USC Sec. 1983 (42 USC Sec.1983) for alleged deprivations of the defendant's cons-



titutional rights. The Court of Appeals for the Ninth Circuit held that he is not. 500 F2d 1301. We affirm." (underlining ours).

Pierson v Ray, 386 US 547, 18 L Ed2d 288, 87 S Ct 1213, is probably the leading authority on the immunity of the judiciary. In that case, the Supreme Court stated:

"We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized

when it adopted the doctrine, in Bradley v Fisher, 13 Wall 335, 20 L Ed 646 (1872)." (Underlining ours)

In Robichaud v Ronan, 351 F2d 533, United States Court of Appeals, 9th Cir., 1965, the court stated:

"We agree with the reasoning of the Lewis case, and we must apply the principle here. The trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them."

In Pitt v Coxe, 65 F. R. D. 355, U. S. D. C., E. D., Pennsylvania, 1975, the Court stated:

"Since it does not appear beyond doubt



that the complained of actions of the defendant were committed beyond the authority of his office as justice of the peace, the motion to dismiss the complaint as to the Section 1983 claim must be denied at this juncture."

In United States v Price, 383 US 787, 16 L Ed2d 267, 86 S Ct 1152, the Court stated:

"In view of the detailed opinions in Williams I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that Sec. 241 must be read as it is written--to reach conspiracies 'to injure... any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States...'; that this language includes rights or privileges protected by the Fourteenth Amendment; that whatever the ultimate coverage of the section

may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons; and that the indictment in No. 59 properly charges such a conspiracy in violation of Sec. 241. We shall confine ourselves to a review of the major considerations which induce our conclusion." In Hall v Garson, 430 F2d 430, 5th Cir. (1970), the Court stated:

"It is equally clear that private citizens who act in concert with state officials are clothed with state action for the purposes of both Sec. 1983 and the Fourteenth Amendment. See e.g. United States v Price, 1966, 383 U.S. 787, 86 S Ct 1152, 16 L Ed2d 267; Gomez v Florida State Employment Commission, 5 Cir., 1969, 417 F2d 569, 578."

In Fulton v Emerson Electric Co., 420 F 2d 527, 5th Cir. (1969), the Court stated:



"Concerted action of private parties and state officials has consistently been held to be sufficient allegation of 'state action' for 42 USCA Sec. 1983 and Sec. 1985."

## SUMMARY

The right to present evidence in one's own behalf is basic to the American system whether the defendant be before a magistrate or before a District Judge. This right was summarily denied by the defendants-respondents. The petitioner has alleged a conspiracy on the part of the respondents to cause her to be tried on a criminal indictment by denying her the basic rights to which she is entitled under the Constitution of the State of Texas and the United States. It is alleged that this conspiracy was entered into by them in their individual capacity but under the color and authority of office. Surely there

must be some limitation on the conduct of a justice of the peace and prosecutors in conducting a criminal prosecution. The allegations of the petition show that these respondents far exceeded their authority in a desperate effort to place blame where blame did not lie. The Petitioner is entitled to a trial on these allegations.

WHEREFORE, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. G. HORNBERGER
J. G. HORNBERGER, JR.
915 Victoria St.
Laredo, Texas 78040
AC 512 72 2-1121
Counsel for Petitioner

by _____
J. G. Hornberger



## CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Petition for a Writ of Certiorari was mailed to Horace C. Hall, Hall & Zaffirini, 511 Sames-Moore Building, Laredo, Texas 78040, attorney for the respondents, Francisco J. Flores, Carlos M. Zaffirini and Arturo Villarreal, to Charles R. Borchers, P.O. Box 1343, Laredo, Texas, 78040, of Counsel for the Respondents, Borchers, Ramos, Whitworth and Trigo, and to Mr. Morris M. Reese, Jr., Fansler, Reese & Palacios, 1800 Victoria, Laredo, Texas 78040, attorney for the respondent, A.A. Alvarado, on the 31st day of May, 1978.

_____
J.G. Hornberger

IRENE PEREZ, Plaintiff-Appellant

v

CHARLES R. BORCHERS, etc, et al,
Defendants-Appellees,

NO. 77-2051

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Feb. 2, 1978

Civil rights action was brought on theory that defendants participated in an alledgedly unlawful criminal prosecution against plaintiff. The United States District Court for the Southern District of Texas, at Laredo, Robert O'Conor, Jr., J., granted defendants' motion to dismiss for failure to state a claim on which relief could be granted, and plaintiff appealed. The Court of Appeals held that: (1) justice of the peace acting in the discharge of his official duties in connection with prosecution of plaintiff was immune from suit, as were prosecutors, and (2) defendants who were private citizens



could not be liable for alledgedly conspiring with the other defendants who were entitled to immunity.

Affirmed.

1. CIVIL RIGHTS 13.8(5)

Justice of the peace was immune from suit under civil rights statute in connection with alledgedly unlawful criminal prosecution where all actions alleged against him took place in the discharge of his official duties. 42 U.S.C.A. Section 1983, 1985, 1986, 1988.

2. CIVIL RIGHTS 13.8(6)

Prosecutors were immune from suit under civil rights statute in connection with allegedly unlawful criminal prosecution against plaintiff. 42 U.S.C.A. Section 1983,1985, 1986,1988.

3. CONSPIRACY 13

Private citzens could not be liable under civil rights statutes for conspiring with other defendants who were entitled to judicial or

prosecutorial immunity in connection with alledgedly unlawful criminal prosecution. 42 U.S.C.A Section 1983, 1985, 1986, 1988.

---

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RONEY, and HILL, Circuit Judges.

PER CURIAM:

This is an appeal from the dismissal of a suit for damages for alleged violations of federal civil rights under 42 U.S.C. Section 1983, 1985, 1986, and 1988.

The district judge granted the defendants motions to dismiss for failure to state a claim upon which relief could be granted. We affirm.

This case originated with an investigation into missing motor vehicle sales tax receipts within the Webb County Tax Assessor-Collector's



Office in Webb County, Texas. The missing receipts resulted in a deficiency of approximately $265,000. The investigation resulted in a criminal complaint filed on February 3,1977, against plaintiff-appellant, who had recently been terminated as a deputy tax assessor-collector of Webb County, Texas.

The criminal complaint which charged appellant with official misconduct under section 39.01 of the Penal Code of Texas was filed with A. A. Alvarado, a justice of the peace who is one of the defendants in this suit.

An examining trial was held by Judge Alvarado on February 21, 1977. Four of the defendants are state prosecutors who represented the state at this trial. Three of the defendants were present at the trial in answer to subpoenas issued by the magistrate at the request of appellant and her attorneys. By stipulation between

the parties, 601 of the missing receipts turned in by appellant, totalling approxmately$50,000, were introduced into evidence. After hearing the testimony introduced by both parties, Judge Alvarado ruled that there was sufficient evidence upon which to bind the appellant over to the grand jury. Thereafter twelve felony indictments were returned against appellant.

In her complaint before the district court, appellant alleged conspiracy to violate federally protected civil rights. Appellant alleged that the defendants participated in an allegedly unlawful criminal prosecution.

(1) One of the principal defendants in the suit is Judge Alvarado, a justice of the peace in Webb County. All the actions alleged against Alvarado took place in the discharge of his official



duties as justice of the peace. Justices of the peace fall within the protective ambit of the judicial immunity doctrine. Consequently, we affirm the dismissal of the complaint against defendant Alvarado who is entitled to immunity to civil actions under the Civil Rights Act. See Gregory v. Thompson, 9Cir. 1974, 500 F2d 59; Hill v McClellan, 5 Cir. 1974, 490 F2d 859.

(2) Defendants Borchers, Ramos, Whitworth, and Trigo were alleged to be prosecutors in the complaint. As such they are also immune from suit. Imbler v Pachtman, 424 U.S. 409, 96 S. Ct. 984 47 L.Ed2d 128 (1976).

(3) The last of the defendants are Flores, Villarreal, and Zaffirini, who were subpoenaed at the request of appellant. They are all private citizens. Zaffirini is also an attorney who represented one of the witnesses.

They are charged with conspiring with the other defendants. As private citizens they cannot be liable for conspiring with the other defendants who are entitled to immunity, since they are not conspiring with persons acting under color of law against whom a valid claim could be stated. Hill, supra. Kurz v State of Michigan, 6 Cir. 1977, 548 F2d 172.

The judgment of the district court is AFFIRMED.



IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 77-2051

---

IRENE PEREZ,

Plaintiff-Appellant,

versus

CHARLES R. BORCHERS, ET AL,

Defendants-Appellees,

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(March 6, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/James C. Hill
United States Circuit Judge

PLAINTIFF'S ORIGINAL COMPLAINT

(WITHOUT EXHIBITS)

(Number and Title Omitted)

Filed: March 3,1977

TO THE HONORABLE THE SAID COURT:

Irene Perez, Plaintiff, complaining of Charles R. Borchers, individually and as District Attorney in and for the 49th Judicial District of Texas; Donato Ramos, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas; Steve A. Whitworth, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas; Sharon S. Trigo, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas;Franicisco J.Flores,individually and as Deputy Tax Assessor-Collector of Webb County,Texas;



A. A. Alvarado, individually and as Justice of the Peace of Precinct 1, Place 2, Webb County, Texas; and Carlos M. Zaffirini, Defendants, respectfully alleges that:

I

This Court has jurisdiction of this cause under the provisions of Title 28 of the United States Code, Section 1331 and 1343.

II

This action arises under the Constitution of the United States, particularly under the provisions of the Fifth and Fourteenth Amendments to the said Constitution of the United States, and under the laws of the United States, particularly under the Civil Rights Act, Title 42 of the United States Code, Sections 1983, 1985, 1986 and 1988.

III

The Plaintiff is a resident of Webb County, Texas, and a citizen of the United States.

The defendant, Charles R. Borchers, is a duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly elected qualified and acting District Attorney in and for the 49th Judicial District of Texas, which District comprises the counties of Webb; Dimmit, and Zapata, in the State of Texas.

The defendant, Donato Ramos, is duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly appointed, qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.



The defendant, Steve A. Whitworth, is a duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly appointed, qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.

The defendant Sharon S. Trigo, is a duly and legally licensed and practicing attorney in Webb County, Texas. She is also and at all times pertinent herein was the duly appointed qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.

The defendant, Francisco J. Flores, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the duly

elected, qualified and acting County Tax Assessor-Collector of Webb County, Texas.

The Defendant, Arturo Villarreal, is and at all times pertinent herein was the duly appointed, qualified and acting Deputy Tax Assessor-Collector of Webb County, Texas.

The defendant, A. A. Alvarado, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the duly elected, qualified and acting Justice of the Peace in and for Precinct 1, Place 2 of Webb County, Texas.

The defendant, Carlos Zaffirini, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the retained



counsel for the defendant, Francisco J. Flores. He is a nephew of the defendant, Francisco J. Flores, and is married to the sister of the wife of the defendant, Charles R. Borchers.

The defendant, Charles R. Borchers, in addition to acting as D strict Attorney in and for the 49th Judicial District of Texas, and receiving a minimum annual salary of $33,000.00 therefor, maintains a private practice of law and has his office at 513 San Bernardo in the City of Laredo, Webb County, Texas.

The defendant, Donato Ramos, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, maintains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

The defendant, Steve A. Whitworth, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, main tains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

The defendant, Sharon S. Trigo, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, maintains a private practice of law and has her office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

The defendant, Francisco J. Flores in addition to acting as Tax Assessor-Collector of Webb County. Texas, and receiving an



annual salary of $19,999.92 therefor, maintains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

IV

Ramiro Martinez is an at all times pertinent herein was a duly appointed and acting Texas Ranger of the State of Texas, and among other counties, is and was at all times pertinent herein, assigned to Webb County, Texas.

V

For at least ten years prior to the 26th day of January, 1977, the Plaintiff was an employee of the Tax Assessor-Collector of Webb County, Texas, and worked in the office of the Tax Assessor-Collector of Webb County,

in the Webb County Courthouse Annex in the City of Laredo in Webb County, Texas.

VI

By letter dated January 26, 1977, to the Plaintiff from the defendant, Francisco J. Flores, the plaintiff was suspended with pay from her position with the Webb County Tax Assessor-Collector effective at 8:30 A. M., January 26, 1977. A copy of such letter is attached hereto, made a part hereof, incorporated herein for all purposes and marked Exhibit "A".

By letter Dated February 1, 1977, to the Plaintiff from the defendant, Francisco J. Flores, the Plaintiff's employment with the office of the Tax Assessor-Collector of Webb County, Texas, was terminated effective



at 8:30 A. M., February 1, 1977. A copy of such letter is attached hereto, made a part hereof, incorporated herein for all purposes and marded Exhibit "B".

VII

On February 3, 1977, a complaint against the plaintiff was signed, sworn to and filed with the defendant, A. A. Alvarado, as Justice of the Peace of Webb County, Texas, for Precinct No. 1, Place 2, in Cause No. 47,749 on the docket of said Justice Court by Ranger Ramiro Martinez, charging the Plaintiff with official Misconduct under the provisions of Section 39.01 (a) (5) of the Penal Code of the State of Texas. A copy of such complaint is attached hereto, made a part hereof, incorporated herein forall purposes and marked

Exhibit "C".

VIII

On the 3rd day of February, 1977, the plaintiff voluntarily appeared with her attorneys, J. G. Hornberger and J. G. Hornberger, Jr., in the office of the said defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, at which time bond in the amount of $20,000.00 was set by the said defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, and acting under color of that office, an examining trial was set for February 21, 1977, at 10:00 A. M. Appearing at the bond setting for the office of the District Attorney wasthe defendant, Donato Ramos, acting in his capacity as Assistant District Attorney in and



for the 49th Judicial District of Texas. The Plaintiff, having been remanded to the custody of the Sheriff of Webb County, Texas, was taken to the office of said Sheriff where she was photographed and fingerprinted and where she made bail and was released.

IX

Pursuant to the setting by the defendant, A. A. Alvarado, an examining trial in said cause No. 47,749 was held in the 111th District Courtroom, Courthouse Annex, in Laredo, Texas, on the 21st day of February, 1977, at 10:00 A. M. with the defendant,A. A. Alvarado, purporting to act in his official capacity as Justice of the Peace of Webb County, Texas, Precinct No. 1, Place No. 2. Appearing with the Plaintiff were her attorneys,

J. G. Hornberger and J. G. Hornberger, Jr.

Purporting to act for the State of Texas and under color of their office were the defendants, Charles R. Borchers and Donato Ramos. Also present was the defendant, Carlos M. Zaffirini acting as counsel for the defendant, Francisco J. Flores. The plaintiff had subpoenaed the following witnesses who appeared and were sworn:

Francisco J. Flores
Arturo Villarreal
Graciela Cruz
Herlinda Rodriguez
Elma Salinas
Lucio Prado
Cruz Cabello
Nick Hernandez
Alicia Medina
Carlos Zaffirini

Prior to the commencement of the taking of testimony the plaintiff invoked the rule, and the rule was invoked as to all witnesses except



as to Ranger Ramiro Martinez and the defendant, Carlos M. Zaffirini. The defendant, Carlos M. Zaffirini, was excused at his request and that of the defendant, Charles R. Borchers, over objection of the plaintiff. The State of Texas then called its first witness, Ranger Ramiro Martinez.

After Ranger Martinez had completed his testimony, the State of Texas then rested, and the plaintiff moved the Court to dismiss the complaint for lack of evidence. Still purporting to act under the color and authority of his office and to further his efforts to deprive the plaintiff of her Constitutional rights, the defendant, Charles R. Borchers, in an argument unprecedented in the history of this state objected to the plaintiff being allowed to

make a bill of exceptions and he objected to the witnesses being placed under the rule while testimony was being taken on the bills of exceptions, all of which exceptions were sustained by the defendant, A. A. Alvarado purporting to act under the color and purported authority of his office. The defendant, Borcher further argued to the court that"probable cause" had been shown and that the plaintiff should be bound over to the Grand Jury even though the testimony of Ranger Martinez made it absolutely clear . there was no evidence whatsoever of plaintiff's guilt of the alleged offense. Also in furtherance of his efforts to deprive the plaintiff of her Constitutional rights, the defendant, Borchers, advised and conferred with the defendant, Carlos M. Zaffirini, who was



at the counsel table as counsel for the defendant, Francisco J. Flores, in an effort to prevent any evidence of the guilt of any other party of the alleged offense. The defendant, Borchers objected to the efforts of the defense counsel to showthat the offense was not only not committed by the plaintiff, but was committed by another person or persons, and such objection was upheld by the magistrate, the defendant, A. A. Alvarado. A copy of the proceeding had and testimony taken at such examining trial in attached hereto, incorporated herein, made a part hereof for all purposes and marked Exhibit "D".

X

Under the color and pretense of the statutes, ordinances, regulations, customs

and usage of the State of Texas, and purporting to act under the color and purported authority of his office as District Attorney in and for the 49th Judicial District of Texas, and with the malicious intent to subject or cause to be subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit.

1. The right not to be deprived of life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Constitution of the United States;

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property,



without due process of law;

and to cause her great mental and physical injury; and knowing that there was not sufficient evidence to cause a complaint to be issued against the plaintiff, the said defendant, Charles R. Borchers, in a determined effort to protect and assist the defendant, Francisco J. Flores, and his counsel, the defendant, Carlos M. Zaffirini, as well as the defendant, Arturo Villarreal, and otherpersons, and to cause the general public to believe that the plaintiff was solely responsible for an alleged shortage of money in the office of the Tax Assessor-Collector of Webb County, Texas, the said defendant, Charles R. Borchers, maliciously and without foundation therefor, and without causing an audit to be made of the office of the

Tax Assessor-Collector, caused the said Ranger Ramiro Martinez, to sign, swear to and file with the defendant, A. A. Alvarado, purporting to act as Justice of the Peace, the complaint attached hereto as Exhibit "C", thereby causing her to be incarcerated until the required bond was made. The conduct and acts of the defendant, Borchers, at the said examining trial, all as are hereinbefore set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore ser forth. The Plaintiff alleges that it is a fact that in performing the acts above set forth the defendant, Charles R. Borchers, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity



other than his quasi-judicial capacity; further the said defendant in performing said acts was not discharging his official duties, was not acting in his official capacity, and was not in the performance of an integralpart of the judicial process. The plaintiff further alleges that the said defendant Borchers, acted in bad faith and without hope of obtaining a valid conviction, but only to protect other persons.

XI

Under the color and pretense of the Statutes, ordinances, regulations, customs and usages of the State of Texas, and purporting to act under the color and purported authority of his office as Assistant District Attorney in and for the 49th Judicial District of Texas, and with the malicious intent to subject or cause to be

subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit:

1. The right not to be deprived of life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Contitution of the United States.

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property, without due process of law:

and to cause her great mental and physical injury; and knowing that there was not sufficient evidence to cause a complaint to be issued



against the plaintiff, the said defendant, Donato Ramos, in a determined effort to protect and assist the defendant, Francisco J. Flores, and his counsel, the defendant, Carlos M. Zaffirini, as well and the defendant, Arturo Villarreal, and other persons, and to cause the general public to believe that the plaintiff was solely responsible for an alleged shortage of money in the office of the Tax Assessor-Collector, of Webb County, Texas, the said defendant, Donato Ramos, maliciously and without foundation therefor, and without causing an audit to be made of the office of the Tax Assessor-Collector, caused the said Ranger Ramiro Martinez, to sign, swear to and file with the defendant, A. A. Alvarado, purporting to act as Justice of the Peace, the complaint attached

hereto as Exhibit "C", thereby causing her to be incarcerated until the required bond was made. The conduct and acts of the defendant, Ramos, at the said examining trial, all as are hereinbefore set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore set forth. The plaintiff alleges that it is a fact that in performing the acts above set forth the defendant, Donato Ramos, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity other than his quasi-judicial capacity; further the said defendant in performing said acts was not discharging his official duties, was not in the performance of an integral part of the



Judicial process. The plaintiff further alleges that the said defendant, Ramos, acted in bad faith and without hope of obtaining a valid conviction, but only to protect other persons.

XII

Under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Texas, and purporting to act under the color and purported authority of his office as Justice of the Peace in and for Precinct 1, Place 2, of Webb County, Texas, and with the malicious intent to subject or cause to be subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit:

1. The right not to be deprived of

life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Constitution of the United States;

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property, without due process of law;

and cause her great mental and physical injury and having full knowledge of the proper procedure to be followed in an examining trial the said defendant, A. A. Alvarado, refused to permit the plaintiff to put on testimony in her own behalf, refused to allow her to properly preserve her record, and bound her over to the March Term of the Grand Jury of the 49th



District Court of Webb County, Texas, on evidence clearly insufficient. The conduct and acts of the defendant, A. A. Alvarado, at the said examining trial, all as are hereinabove set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore set forth. The Plaintff alleges that it is a fact that in performing the acts above set forth the defendant, Alvarado, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity other than his quasi-judicial capacity; further the said defendant, Alvarado, in performing said acts was not discharging his official duties, was not acting in his official capacity and was not in

the performance of an integral part of the judicial process.

XIII

The plaintiff further alleges that the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whitworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal, A. A. Alvarado and Carlos M. Zaffirini, intentionally conspired and intentionally entered into a conspiracy for an unlawful purpose, to-wit: The purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Texas with the intent to deny to the plaintiff, a citizen of the United States and of the State of Texas, the equal protection of the laws, and particularly to deny her the right not to be deprived of the



rights of life, liberty or property without due process of law, in violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. Particularly, but not exclusively, the said defendants conspired to:

A. Cause a criminal complaint to be filed against the plaintiff without any basis therefor or hope of conviction thereunder.

B. Cause her to be incarcerated under said baseless complaint.

C. Cause her to be denied a fair and impartial examining trial, all as is provided for by the laws of the State of Texas.

D. Cause other persons suspected of the offense with which plaintiff was charged, namely the defendants,

Francisco J. Flores and Arturo Villa-
rreal, and others to be granted unofficial
but effective protection from prosecution.

E. Cause the general public and any prospective grand jury to believe through information given to the news media, that the plaintiff was solely responsible for any alleged shortage of money in the office of the Tax Assessor-Collector of Webb County, Texas.

F. To cause the plaintiff, and the plaintiff only, to be indicted for said alleged offense based on hearsay and other inadmissible evidence, primarily to protect the said defendants, Francisco J. Flores and Arturo Villa-
rreal, and others.



G. To deprive the plaintiff of a legally constituted court for her examining trial.

H. To deprive the plaintiff of her civil rights without due process of law.

I. To accomplish an unlawful purpose through purported lawful means.

J To judicially blackmail the plaintiff into paying shortages in the office of the Tax Assessor-Collector of Webb County, Texas, for which she was not liable or responsible in order that the persons who are liable and responsible will not have to pay said shortages.

In furtherance of and to accomplish the unlawful purpose of the conspiracy the defendants committed the following overt acts:

1. The defendant, Borchers, had a conversation with the defendant, Carlos M. Zaffirini, on or about February 1, 1977, relating to the plaintiff, Irene Perez.

1a. Shortly thereafter, the defendant, Carlos M. Zaffirini, called the plaintiff's attorney to inquire when she would make restitution.

2. The defendant, Borchers, had a conversation with Ramiro Martinez, Texas Ranger, on or about February 2, 1977.

3. The defendants, Borchers and Ramos, caused Ranger Ramiro Martinez to file a criminal complaint against the plaintiff in Criminal No. 47,749, before



the defendant, A. A. Alvarado.

4. The defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, Precinct 1, Place 2, accepted the recommendation of the defendant, Donato Ramos, as to the amount of the bond.

5. The defendant, A. A. Alvarado, ordered the incarceration of the plaintiff until she made bond.

6. The defendants, Borchers and Ramos, appeared at the examining trial of the plaintiff on February 21, purportedly to represent the State of Texas.

7. The defendant, Carlos M. Zaffirini, even though he was only representing a potential witness, asked to be

excused from the rule after it was invoked at said examining trial, and the defendant, A. A. Alvarado, over the objection of the plaintiff, excused the said defendant, Carlos M. Zaffirini, from the rule.

8. The defendants, Borchers and Ramos, conferred and advised with the defendant, Carlos M. Zaffirini, during the examining trial.

9. The defendant, Borchers after presenting the evidence adduced from Ranger Martinez contended to the defendant, A. A. Alvarado, that the plaintiff should not be allowed to present evidence in her behalf. The defendant, A. A. Alvarado, sustained such



contention and bound the plaintiff over to the March Term of the 49th District Court of Webb County.

10. The defendant, A. A. Alvarado, refused to permit the plaintiff to perfect her bill of exceptions as to evidence to be adduced from her subpoenaed witnesses.

11. The defendant, A. A. Alvarado, at the suggestion of the defendant, Borchers, refused to invoke the rule as to any testimony to be taken on bills of exceptions.

12. The defendant, A. A. Alvarado, after hearing argument by the defendant, Borchers, bound the plaintiff over to the March Term Grand Jury of Webb County, Texas, even though there was presented

no evidence whatsoever of her guilt or even probate guilt.

13. The defendants, Borchers and Ramos, have refrained from causing criminal complaints to be issued against the defendant, Francisco J. Flores, who is represented by the defendant Zaffirini, and Arturo Villarreal, or other persons primarily responsible for the repayment of the shortages that are alleged to exist in the office of the Tax Assessor-Collector of Webb County, Texas.

A copy of a letter from the Comptroller of Public Accounts of the State of Texas to the Governor of the State of Texas regarding the alleged shortages and the persons liable therefor is attached hereto,



incorporated herein and made a part hereof for all purposes, and marked Exhibit "E".

In entering into and carrying out such conspiracy, the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whitworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal and A. A. Alvarado, and each of them, acted outside and beyond the scope of their authority and without authorization of law. That the said defendant, A. A. Alvarado, in conducting said examining trial acted without any jurisdiction whatsoever, did not act under authority of his office or in the exercise of his statutory duty and judicial position, and did not act in the performance of an integral part of the judicial, process, but on the contrary, as part of a pre-conceived plan or scheme to

deny the plaintiff the rights to which she is entitled under the Constitution of the United States.

That the defendants, Borchers, Ramos, Whirworth and Trigo, were acting under color of law and purported authority only, and having abandoned their quasi-judicial; that they were not performing their official duties, were not acting in an official capacity and were not in the performance of an integral part of the judicial process. Plaintiff further states that they and each of them acted in bad faith and without hope of obtaining a valid conviction.

XIV

At the time of the acts hereinabove described, the plaintiff was approximately 46



years of age (having been born April 5, 1931), was in good health, enjoyed a good reputation in the community and had a reasonable life expectancy of 29.54 years under the Standard Tables of Mortality. She was earning $608.00 per month in her position with the office of the Webb County Tax Assessor-Collector, approximately an additional $300.00 permonth for notary fees (having previously been appointed a Notary Public by the Governor of the State of Texas), and in her spare time made approximately $180.00 per month as a night clerk at a local motel. She states that, except for the unlawful acts on the part of the defendants, she would have continued to realize approximately the same income for the balance of her life. By virtue, however, of the acts

of the defendants, and each of them, by virtue of the misuse of power by the defendants, Borchers, Ramos, Whitworth, Trigo, Flores, Villarreal and Alvarado, and each of them, acting under color of their office, and by virtue of the unlawful conspiracy entered into and carried out against this plaintiff by the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whirworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal, A. A. Alvarado and Carlos M. Zaffirini, and each of them, and as a direct and proximate result thereof, the plaintiff has suffered great physical and mental injury, humiliation and embarrassment. Additionally, plaintiff has been fired from her position with the local motel. She has made repeated attempts to secure other employment, but has been turned down because



of the unfounded charges made against her and the resulting publicity. Plaintiff states that even though she is not guilty of the charge made against her, she states that her good reputation has now been destroyed, and in all reasonable probability she will not be able to secure gainful employment for the balance of her life. That, therefore, she is entitled to compensatory damages in the sum of Four Hundred Fifty Thousand and No/100 ($450,000.00).

XV

Plaintiff further states that the acts of the defendants and each of them, as aforesaid, were done wilfully, maliciously and with callous and reckless indifference to the civil rights of this plaintiff, and therefore, she is entitled to punitive damages in the sum of

Fifty Thousand and No/100 Dollars ($50,000.00).

WHEREFORE, plaintiff prays that the defendants be cited to appear and answer herein, and that on final hearing hereof she be granted judgment against the defendants and each of them for compensatory damages in the sum of $450,000.00, for punitive damages in the sum of $50,000.00, for costs of suit and for such other and further relief, in law and in equity, to which she may be entitled.

J. G. HORNBERGER
J. G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Plaintiff
AC 512 722-1121

by S/ J. G. Hornberger, Jr.
J. G. Hornberger, Jr.
Attorney-in-Charge

PLAINTIFF REQUESTS A JURY TRIAL.



AMENDED MOTION TO DISMISS

(Number and Title Omitted)

Defendants, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo, move the Court under Rule 12 (b) 6 as follows:

To dismiss the action with prejudice because the complaint fails to state a claim or action against these four defendants upon which relief can be granted. Plaintiff admits in her complaint that these Defendants are state prosecuting attorneys, and were State prosecuting attorneys, at all times material to her claim. These defendants were, and are, State prosecuting attorneys as more particularly appears from the affidavit of Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo attached hereto as Exhibit A.

In support of this motion these defendants cite the United States Supreme Court case of Imbler v Pachtman, 96 S.Ct. 984 (1976), which gives absolute immunity to State prosecuting attorneys.

These Defendants also move the Court to grant them reasonable attorneys' fees as part of the costs in this suit under Civil Rights Act, Title 42 of United States Code, Section 1989.

Respectfully submitted,
Charles R. Borchers
Donato D. Ramos
Steve A. Whitworth
Sharon S. Trigo
Attorneys at Law and
Defendants

By: /s/ Charles Borchers
One of said attorneys,
Defendant, pro se
P.O. Box 1343
Laredo, TX 78040

---

EXHIBIT A

THE STATE OF TEXAS |
COUNTY OF WEBB |



BEFORE ME, the undersigned Notary Public in and for Webb County, Texas, personally appeared Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo, each known to me to be credible persons over the age of eighteen years, who having been first duly sworn by me, upon their oaths, stated as follows:

That at all times material to the claim as alleged by Irene Perez in Civil Action L-77-15 in the United States District Court for the Southern District of Texas, Laredo Division, we were and are State prosecuting attorneys to-wit:

1) That Charles R. Borchers is the duly elected, qualified and acting District Attorney of the 49th Judicial District of Texas, which includes Webb, Dimmit and Zapata Counties.

2) That Donato D. Ramos is the duly appointed, qualified and acting First Assistant District Attorney of the 49th Judicial District of Texas.

3) That Steve A. Whitworth is a duly appointed, qualified and acting First Assistant District Attorney of the 49th Judicial District of Texas;

4) That Sharon S. Trigo is a duly appointed, qualified and acting Assistant District Attorney of the 49th Judicial District of Texas;

That those of us who participated in connection with the initiation of a criminal prosecution against Irene Perez and presenting the State's case at her examining trial, acted and participated within the scope of our duties as State prosecuting attorneys.

That a grand jury is not scheduled to convene until March 21, 1977. The last grand jury was dismissed in October, 1976.

S/ Charles Borchers
Charles Borchers
S/ Donato D. Ramos
Donato D. Ramos
S/ Steve A. Whitworth
Steve A. Whitworth



S/ Sharon S. Trigo
Sharon S. Trigo

SWORN TO AND SUBSCRIBED by the said Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo on this the 8th day of March, 1977, to certify which witness my hand and seal of office.

S/ Concepcion Wise
Notary Public, Webb County, Texas.

My commission expired June 1, 1977.

---

MOTION TO DISMISS

(Number and Title Omitted)

NOW COMES FRANCISCO J. FLORES, Individually and as Tax Assessor-Collector of Webb County, Texas, defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.

"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief." Guedry v Ford, 431 F2d 660, 5th Cir. (1970) at page 664.

"Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act." Hill v McClellan, 490 F2d 59, 5th Cir (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, cannot be held liable, since he is not conspiring with persons



acting under color of law against whom a valid claim could be stated. Watts v McGowan, 516 F 2d 203, 3 Cir (1975); Guedry v Ford, supra, Hill v McClellan, supra.

Respectfully submitted,
s/ H. C. Hall, III
H. C. Hall, III, Attorney in Charge for the Defendant, Francisco J. Flores

OF COUNSEL:
HALL AND ZAFFIRINI
511 Sames-Moore Building
Laredo, Texas 78040

---

MOTION TO DISMISS

(Number and Title Omitted)

NOW COMES CARLOS M. ZAFFIRINI, Defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.

"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief." Guedry v Ford 431 F2d 660, 5th Cir. (1970) at page 664.

Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act. " Hill v McClellan, 490 F 2d 59, 5th Cir (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Carlos M. Zaffirini cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated.



Watts v McGowan, 516 F2d 203, 3 Cir (1975); Guedry v Ford, supra; Hill v McClellan, supra.

Respectfully submitted,
s/ H. C. Hall, III
H. C. Hall, III, Attorney
in Charge for the Defendant
Carlos M. Zaffirini

OF COUNSEL:
HALL AND ZAFFIRINI
511 Sames-Moore Building
Laredo, Texas 78040

---

MOTION TO DISMISS

(Number and Title Omitted )
Filed: March 22, 1977

Defendant, A.A. Alvarado, individually and in his capacity as Justice of the Peace of Precinct 1, Place 2, Webb County, Texas, hereinafter called Defendant, moves the Court under Rule 12 (b) 6, F.R.C.P., to dismiss this civil action based on one or more of the following grounds:

1. Defendant is immune from suit and

from liability for damages under 42 U. S. C. 1983, 1985, 1986, and 1988.

2. Defendant was at all times material to Plaintiff's complaint and still is a Justice of the Peace as more particularly appears from the affidavit of Defendant A. A. Alvarado attached hereto as Exhibit A. Plaintiff Irene Perez, hereinafter called Plaintiff, in her complaint admits such fact.

3. Defendant relies on the judicially recognized doctrine of absolute immunity from liability in civil rights actions for all judicial acts performed within the jurisdiction and scope of authority of a judge.

4. Plaintiff has failed to state a claim upon which relief can be granted.

5. Plaintiff's complaint is barren of any allegation that Defendant played any role other than that of Justice of the Peace under the laws



of the State of Texas, at all times material to Plaintiff's complaint.

WHEREFORE, premises considered, Defendant herein prays that Plaintiff's complaint be in all things dismissed, that Defendant have his costs including reasonable attorney's fees and for such other and further relief to which Defendant herein may be entitled either in equity or at law.

FANSLER, REESE & PALACIOS
1800 Victoria
Laredo, Texas 78040

by s/ Morris M. Reese, Jr.
Morris M. Reese, Jr.
Attorney in Charge for
Defendant

Sworn to and subscribed before me by the said Morris M. Reese, Jr., this the 21st day of March, 1977.

/s/ Rose Marie Ann Herbst
Notary Public, Webb County, Texas.

EXHIBIT A

THE STATE OF TEXAS |
COUNTY OF WEBB. |

BEFORE ME, the undersigned Notary Public in and for Webb County, Texas, personally appeared A. A. Alvarado, known to me to be a credible person over the age of eighteen years, who having been first duly sworn by me, upon his oath, stated as follows:

That as to all matters contained in and at all times material to the claim alleged by Plaintiff Irene Perez in Civil Action L-77-15 in the United States District Court for the Southern District of Texas, Laredo Division, entitled IRENE PEREZ V. CHARLES R. BORCHERS, ET AL, I was and still am Justice of the Peace of Precinct 1, Place 2, Webb County, Texas, more specifically:

1) That I, A. A. Alvarado am the duly



elected, qualified and acting Justice of the Peace of Precinct 1, Place 2, Webb County, Texas.

2) That I acted pursuant to my judicial authority as Justice of the Peace under the laws of the State of Texas and within my jurisdiction as Justice of the Peace under said laws in all matters including the setting of bond on criminal complaint No. 47,749 filed in my Court against the Plaintiff on or about February 3, 1977 and to the holding and conducting of an examining trial in my court on the said complaint on or about February 21, 1977.

3) That I have not acted other than in my role as Justice of the Peace in regard to Plaintiff or the complaint against her.

S/ A. A. Alvarado
A. A. Alvarado

Sworn to and subscribed by the said A. A. Alvarado, on this 18th day of March, 1977, to certify which witness my hand and seal of

office.

S/ Rose Marie Ann Herbst
Notary Public, Webb County,
Texas.

---

MOTION TO DISMISS

(Number and Title Omitted)

Filed March 31, 1977

NOW COMES ARTURO VILLARREAL, individually and as Deputy Tax Assessor-Collector of Webb County, Texas, defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.

"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and



hence insufficient to constitute a basis for relief." Guedry v Ford, 431 F2d 660, 5th Cir (1970) at page 664.

"Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act." Hill v McClellan, 490 F2d 59, 5th Cir. (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Arturo Villarreal, individually and as Deputy Tax Assessor-Collector of Webb County, Texas, cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. Watts v McGowan, 516 F2d 203, 3 Cir (1975); Guedry v

Ford, supra; Hill v McClellan, supra.

Respectfully submitted,

s/ H. C. Hall, III
H. C. Hall, III, Attorney in
Charge for the Defendant
Arturo Villarreal

of counsel

Hall & Zaffirini
511 Sames-Moore Building
Laredo, Texas 78040



ORDER

(Number and Title Omitted)

Filed April 27,1977

On this the 27th day of April, 1977, came on to be heard the motion to Dismiss of the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, and the Court being of the opinion that same should be (granted) (~~denied~~);

It is therefore ORDERED that the Motion to Dismiss of the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, be and is hereby (granted)(~~denied~~).

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE

ORDER

(Number and Title Omitted)

Filed April 27, 1977

On this the 27th day of April, 1977, came on to be heard the Motion to Dismiss of the Defendant Carlos M. Zaffirini, and the Court being of the opinion that same should be granted)(~~denied~~);

It is therefore ORDERED that the Motion to Dismiss of the defendant Carlos M. Zaffirini be and is hereby (granted) (~~denied~~).

SIGNED at Laredo, Texas this the 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
Robert O'Conor, Jr.
United States District Judge



ORDER OF DISMISSAL

(Number and Title Omitted)

Filed April 27, 1977

This cause came on for hearing on the 27th day of April, 1977, on the Motion of Defendant, A. A. Alvarado, to dismiss the action because the complaint fails to state a claim against said defendant upon which relief can be granted, and the Court having heard the argument of counsel and being fully advised, accordingly,

IT IS ORDERED that the motion of Defendant, A. A. Alvarado be granted, and that the complaint be and it is hereby dismissed with prejudice as to Defendant, A. A. Alvarado.

SIGNED this 27th day of April, 1977.

/s/ Robert O'Conor
Robert O'Conor, Jr.
United States District Judge

ORDER

(Number and Title Omitted)

Filed April 27, 1977

On this the 27th day of April, 1977, came on to be heard the Motion to Dismiss of the Defendant Arturo Villarreal, Individually and as Deputy Tax Assessor-Collector of Webb County, Texas, and the Court being of the opinion that same should be (granted) ~~(denied)~~

It is therefore ORDERED that the Motion to Dismiss of the defendant Arturo Villarreal, Individually and as Deputy Tax Assessor-Collector of Webb County, Texas, be and is hereby (granted) ~~(denied)~~.

Signed at Laredo, Texas, this 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE



ORDER

(Number and Title Omitted)

Filed April 27, 1977

This cause came on for consideration on the 27th day of April, 1977, on the motion of Defendant, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth, and Sharon S. Trigo, to dismiss the action because the complaint fails to state a claim against said defendants upon which relief can be granted, and the Court having considered all papers filed herein and being fully advised, it is.

ORDERED that the Motion of Defendants, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo to dismiss is granted.

Signed at Laredo,Texas,this 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
JUL 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1749

IRENE PEREZ,

PETITIONER

VS

CHARLES R. BORCHERS, INDIVIDUALLY AND AS DISTRICT ATTORNEY IN AND FOR THE 49TH JUDICIAL DISTRICT OF TEXAS, ET AL

RESPONDENTS

---

# BRIEF IN OPPOSITION OF RESPONDENTS FRANCISCO J. FLORES, ARTURO VILLARREAL, AND C. M. ZAFFIRINI

---

HALL AND ZAFFIRINI
511 Sames-Moore Bldg.
Laredo, Texas 78040

Attorneys for Respondents
Francisco J. Flores,
Arturo Villarreal and
C. M. ZAFFIRINI

TABLE OF CONTENTS


Page

Statement of the Case ..... 2

Argument and Authorities ..... 5

Conclusion ..... 9

Certificate of Service ..... 10

Appendix:

Opinion of United States Court of Appeals ..... App-1-7

Order Denying Motion for Rehearing ..... App-8

Plaintiff's Original Complaint (Without Exhibits) ..... App-9-49

Amended Motion to Dismiss of Borchers, Ramos, Whitworth and Trigo .....App-50-54

Motion to Dismiss of Francisco J. Flores ..... App-54-56

Motion to Dismiss of Carlos M. Zaffirini ..... App-56-58

Motion to Dismiss of A.A.Alvarado.. App-58-63

Motion to Dismiss of Arturo Villarreal ..... App-63-65


Table of Contents
Appendex - Cont'd


Page

Orders of Dismissal ..... App-66-70

Appellees' Motion to Take Judicial Notice and to Augment Record on Appeal (With Exhibits) .....App-71-105

Fifth Circuit Court Order of Judge James C. Hill Granting Motion to Take Judicial Notice and to Augment Record ..... App-106

TABLE OF CASES


| Cases: | Page |
|---|---|
| Guedry v. Ford, 431 F 2d 660 ..... | 5 |
| Hill v. McClellan, 490 F 2d 859 ..... | 6 |
| Kurz v. State of Michigan, 548 F 2d 172 ..... | 8 |
| Waits v. McGowan, 516 F 2d 203..... | 7 |




IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

: No. 77-1749

IRENE PEREZ,

PETITIONER

VS

CHARLES R. BORCHERS, INDIVIDUALLY AND AS DISTRICT ATTORNEY IN AND FOR THE 49TH JUDICIAL DISTRICT OF TEXAS, ET AL

RESPONDENTS

---

BRIEF IN OPPOSITION
OF RESPONDENTS FRANCISCO J. FLORES,
ARTURO VILLARREAL, AND
C. M. ZAFFIRINI

---

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now come Francisco J. Flores, Arturo Villarreal and C. M. Zaffirini, Respondents in the above styled cause and respectfully submit this their Brief in Opposition.

## STATEMENT OF THE CASE

On April 27, 1977, the trial court granted Respondents' Motion to Dismiss (App. 66, 67, 69) for failure to state a claim upon which relief could be granted. On February 2, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's action.

In mid-January 1977, the Texas State Comptroller conducted an audit of the Motor Vehicle Sales Tax Division within the Webb County Tax Assessor-Collector's office. In the course of the audit it was discovered that approximately 2300 to 2400 Motor Vehicle Sales Tax



receipts were missing. It was estimated by the Comptroller's Staff that the receipts represented approximately $250,000.00. Subsequent thereto, the District Attorney for Webb County, Charles Borchers, conducted an investigation. On February 3, 1977, the District Attorney filed a criminal complaint against Petitioner charging her with official misconduct under the provisions of Section 39.01(a)(5) of the Penal Code of Texas. The complaint was filed with A.A. Alvarado, Justice of the Peace for Precinct No. 1, Place 2 of Webb County, Texas.

On February 21, 1977, an examining trial was held before Judge Alvarado. By stipulation between the District Attorney and Petitioner's counsel J.G. Hornberger, six hundred one (601) of the missing receipts previously surrendered by Petitioner's counsel to the District Attorney,

were admitted into evidence. Said receipts represented approximately $50,00.00. After heari ng the testimony of the State's witnesses and two defense witnesses Judge Alvarado bound Petit ner over to the Grand Jury. Petitioner was subsequently indicted, tried and convicted (App-75-105 ). Subsequent to the examining trial and prior to trial and conviction on the criminal charges, Petitioner filed suit in U. S. District Court alleging a conspiracy by Appellees. Said complaint was dismissed as to all and Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The said appellate court affirmed the Trial Court.



## ARGUMENT AND AUTHORITIES

Petitioner alleges that Respondents conspired with Respondent Borchers, prosecuting attorney and Respondent Alvarado, Justice of the Peace. Respondents in their Motions to Dismiss in the District Court denied any conspiracy and do so again. However, accepting them as true for purposes of the Motion to Dismiss Petitioner failed to state a claim upon which relief could be granted and the District Court properly dismissed the complaint.

The Fifth Circuit Court of Appeals, in Guedry v. Ford, 431 F 2d 660, 5th Cir (1970) at Page 664 in a similar appeal states:

> " A private person cannot be held liable under Title 42 U.S.C. § 1983 unless his wrongful action was done under color of state law or state authority. Further, a private person alleged to have conspired with a state judge and prosecuting attorney who are entitled to immunity, cannot be held liable, since he is not conspiring

with persons acting under color of law 'against whom (plaintiff) could state a valid claim' under 42 U.S.C. §1983. Haldane v. Chagnon, 345 F 2d 601, 604 (9th CCA 1965) Shakespeare v. Wilson, 40 F.R.D. 500, 505 (SD. Calif. 1966) Stambler v. Dillon, 302 F. Supp 1250 (S.D.N.Y. 1969) Jemzura v. Belden, 281 F. Supp 200, 206 (N.D.N.Y. 1968) Cf. Hall v. Garson (5 CCA 1970) 430 F 2d 430, at 439 (1970).

Assuming all the well pleaded facts in the complaint to be true and viewing the allegations of the complaint in the light most favorable to the plaintiff, it appears beyond doubt that he can prove no set of facts in support of his claim upon which relief can be granted. Plaintiff's allegation that a conspiracy existed between all the captioned defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief.

Accordingly, the court finds that there is no genuine issue of material fact and that the defendants are entitled to a judgment as a matter of law, dismissing the plaintiff's complaint against them."

In a more recent opinion in a similar appeal the Fifth Circuit Court of Appeals in Hill v. McClellan 490 F 2d 859, 5 Cir (1974) states at page 860:



"Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts; likewise they are not liable under said Acts. Skolnick v. Martin 7 Cir., 1963, 317 F 2d 855, 856, cert. denied. 375 U.S. 908, 84 S.Ct. 199, 11 L.Ed. 2d 146, rehearing denied, 375 U.S. 960, 84 S.Ct. 440, 11 L.Ed 2d 319 Carmack v. Gibson, supra; Brown v. Dunne, 7 Cir., 1969, 409 F. 2d 341; Hanna v. Home Insurance Co., supra.

A private person cannot be held liable under 42 U.S.C. § 1983 unless his wrongful action was done under color of state law or state authority. Further, a private person alleged to have conspired with a state judge and attorney who are entitled to immunity cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. Guedry v. Ford, supra, 431 F 2d at 664, and cases cited therein; Brown v. Dunne, supra; Haldane v. Chagnon, 9 Cir., 1965, 345 F. 2d 601, 604."

In Waits v. McGowan, 516 F 2d 203, 3 Cir (1975) the Third Circuit in following the Fifth Circuit Court's opinion in Hill supra, states at page 205:

"A. Immunity under 42 U.S.C. §§1983 and 1985

> In view of the allegations in this record that Gearity was acting solely in the course of his employment as an investigator for a public defender, working as a member of the bar in representing Waits as defendant in a state criminal prosecution (see first sentence of second paragraph under C below), we have concluded that he is immune from this suit. In Hill v. McClellan 490 F 2d 859, 860 (5th Cir. 1974), the court pointed out that 'a private person alleged to have conspired with a state judge and attorney who are entitled to immunity cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. (Citing cases.).' See also French v. Corrigan, 432 F 2d 1211, 1214 (7th Cir. 1970); McIntosh v. Garofalo, 367 F Supp 501, 504-05 (W.D. Pa. 1973)."

More recently, the Sixth Circuit in Kurz v. State of Michigan, 548 F 2d 172 6 Cir. (1977) the Court in an action brought against state, county, state officials and private citizens seeking damages for alleged violations of federal civil rights affirmed the District Court's dismissal. The Court held that the state circuit judge and state



prosecutors were immune from liability; that the state was immune from the suit; and that private citizens could not be held liable for conspiring with state officials to violate plaintiff's civil rights under color of state law when all of state officers were immune from suit.

## CONCLUSION

It is evident therefore that the District Court properly dismissed Petitioner's frivolous complaint and the United States Court of Appeals for the Fifth Circuit correctly affirmed.

WHEREFORE, Respondents pray that this Honorable Court affirm the Court of Appeals judgment by refusing the Petition for Writ of Certiorari.

Respectfully submitted,

HALL & ZAFFIRINI
511 Sames-Moore Building
Laredo, Texas 78040

By: _____
C. M. Zaffirini

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition was mailed to Mr. J.G. Hornberger, 915 Victoria St., Laredo, Texas 78040, Attorney for Petitioner; Charles R. Borchers, P.O. Box 1343, Laredo, Texas 78040, of counsel for the Respondents Borchers, Ramos, Whitworth and Trigo; and Mr. Morris M. Reese, Jr., Fansler, Reese, & Palacios, 1800 Victoria, Laredo, Texas 78040, attorney for the Respondent A.A. Alvarado, on the 17 day of July, 1978.

C. M. Zaffirini



IRENE PEREZ, Plaintiff-Appellant

v

CHARLES R. BORCHERS, etc, et al,
Defendants-Appellees,

NO. 77-2051

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Feb. 2, 1978

Civil rights action was brought on theory that defendants participated in an alledgedly unlawful criminal prosecution against plaintiff. The United States District Court for the Southern District of Texas, at Laredo, Robert O'Conor, Jr., J., granted defendants' motion to dismiss for failure to state a claim on which relief could be granted, and plaintiff appealed. The Court of Appeals held that: (1) justice of the peace acting in the discharge of his official duties in connection with prosecution of plaintiff was immune from suit, as were prosecutors, and (2) defendants who were private citizens

could not be liable for alledgedly conspiring with the other defendants who were entitled to immunity.

Affirmed.

1. CIVIL RIGHTS 13.8(5)

Justice of the peace was immune from suit under civil rights statute in connection with alledgedly unlawful criminal prosecution where all actions alleged against him took place in the discharge of his official duties. 42 U.S.C.A. Section 1983, 1985, 1986, 1988.

2. CIVIL RIGHTS 13.8(6)

Prosecutors were immune from suit under civil rights statute in connection with allegedly unlawful criminal prosecution against plaintiff. 42 U.S.C.A. Section 1983,1985, 1986,1988.

3. CONSPIRACY 13

Private citzens could not be liable under civil rights statutes for conspiring with other defendants who were entitled to judicial or



prosecutorial immunity in connection with alledgedly unlawful criminal prosecution. 42 U.S.C.A Section 1983, 1985, 1986, 1988.

---

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RONEY, and HILL, Circuit Judges.

PER CURIAM:

This is an appeal from the dismissal of a suit for damages for alleged violations of federal civil rights under 42 U.S.C. Section 1983, 1985, 1986, and 1988.

The district judge granted the defendants motions to dismiss for failure to state a claim upon which relief could be granted. We affirm.

This case originated with an investigation into missing motor vehicle sales tax receipts within the Webb County Tax Assessor-Collector's

Office in Webb County, Texas. The missing receipts resulted in a deficiency of approximately $265,000. The investigation resulted in a criminal complaint filed on February 3,1977, against plaintiff-appellant, who had recently been terminated as a deputy tax assessor-collector of Webb County, Texas.

The criminal complaint which charged appellant with official misconduct under section 39.01 of the Penal Code of Texas was filed with A. A. Alvarado, a justice of the peace who is one of the defendants in this suit.

An examining trial was held by Judge Alvarado on February 21, 1977. Four of the defendants are state prosecutors who represented the state at this trial. Three of the defendants were present at the trial in answer to subpoenas issued by the magistrate at the request of appellant and her attorneys. By stipulation between



the parties, 601 of the missing receipts turned in by appellant, totalling approxmately$50,000, were introduced into evidence. After hearing the testimony introduced by both parties, Judge Alvarado ruled that there was sufficient evidence upon which to bind the appellant over to the grand jury. Thereafter twelve felony indictments were returned against appellant.

In her complaint before the district court, appellant alleged conspiracy to violate federally protected civil rights. Appellant alleged that the defendants participated in an allegedly unlawful criminal prosecution.

(1) One of the principal defendants in the suit is Judge Alvarado, a justice of the peace in Webb County. All the actions alleged against Alvarado took place in the discharge of his official

duties as justice of the peace. Justices of the peace fall within the protective ambit of the judicial immunity doctrine. Consequently, we affirm the dismissal of the complaint against defendant Alvarado who is entitled to immunity to civil actions under the Civil Rights Act. See Gregory v. Thompson, 9Cir. 1974, 500 F2d 59; Hill v McClellan, 5 Cir. 1974, 490 F2d 859.

(2) Defendants Borchers, Ramos, Whitworth, and Trigo were alleged to be prosecutors in the complaint. As such they are also immune from suit. Imbler v Pachtman, 424 U.S. 409, 96 S. Ct. 984 47 L.Ed2d 128 (1976).

(3) The last of the defendants are Flores, Villarreal, and Zaffirini, who were subpoenaed at the request of appellant. They are all private citizens. Zaffirini is also an attorney who represented one of the witnesses.



They are charged with conspiring with the other defendants. As private citizens they cannot be liable for conspiring with the other defendants who are entitled to immunity, since they are not conspiring with persons acting under color of law against whom a valid claim could be stated. Hill, supra. Kurz v State of Michigan, 6 Cir. 1977, 548 F2d 172.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 77-2051

---

IRENE PEREZ,

Plaintiff-Appellant,

versus

CHARLES R. BORCHERS, ET AL,

Defendants-Appellees,

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(March 6, 1978)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/James C. Hill
United States Circuit Judge



PLAINTIFF'S ORIGINAL COMPLAINT

(WITHOUT EXHIBITS)

(Number and Title Omitted)

Filed: March 3,1977

TO THE HONORABLE THE SAID COURT:

Irene Perez, Plaintiff, complaining of Charles R. Borchers, individually and as District Attorney in and for the 49th Judicial District of Texas; Donato Ramos, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas; Steve A. Whitworth, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas; Sharon S. Trigo, individually and as Assistant District Attorney in and for the 49th Judicial District of Texas;Franicisco J.Flores,individually and as Deputy Tax Assessor-Collector of Webb County,Texas;

A. A. Alvarado, individually and as Justice of the Peace of Precinct 1, Place 2, Webb County, Texas; and Carlos M. Zaffirini, Defendants, respectfully alleges that:

I

This Court has jurisdiction of this cause under the provisions of Title 28 of the United States Code, Section 1331 and 1343.

II

This action arises under the Constitution of the United States, particularly under the provisions of the Fifth and Fourteenth Amendments to the said Constitution of the United States, and under the laws of the United States, particularly under the Civil Rights Act, Title 42 of the United States Code, Sections 1983, 1985, 1986 and 1988.



III

The Plaintiff is a resident of Webb County, Texas, and a citizen of the United States.

The defendant, Charles R. Borchers, is a duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly elected qualified and acting District Attorney in and for the 49th Judicial District of Texas, which District comprises the counties of Webb; Dimmit, and Zapata, in the State of Texas.

The defendant, Donato Ramos, is duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly appointed, qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.

The defendant, Steve A. Whitworth, is a duly and legally licensed and practicing attorney in Webb County, Texas. He is also and at all times pertinent herein was the duly appointed, qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.

The defendant Sharon S. Trigo, is a duly and legally licensed and practicing attorney in Webb County, Texas. She is also and at all times pertinent herein was the duly appointed qualified and acting Assistant District Attorney in and for the said 49th Judicial District of Texas.

The defendant, Francisco J. Flores, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the duly



elected, qualified and acting County Tax Assessor-Collector of Webb County, Texas.

The Defendant, Arturo Villarreal, is and at all times pertinent herein was the duly appointed, qualified and acting Deputy Tax Assessor-Collector of Webb County, Texas.

The defendant, A. A. Alvarado, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the duly elected, qualified and acting Justice of the Peace in and for Precinct 1, Place 2 of Webb County, Texas.

The defendant, Carlos Zaffirini, is a duly and legally licensed and practicing attorney in Webb County, Texas, and is and at all times pertinent herein was the retained

counsel for the defendant, Francisco J. Flores. He is a nephew of the defendant, Francisco J. Flores, and is married to the sister of the wife of the defendant, Charles R. Borchers.

The defendant, Charles R. Borchers, in addition to acting as D strict Attorney in and for the 49th Judicial District of Texas, and receiving a minimum annual salary of $33,000.00 therefor, maintains a private practice of law and has his office at 513 San Bernardo in the City of Laredo, Webb County, Texas.

The defendant, Donato Ramos, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, maintains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.



The defendant, Steve A. Whitworth, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, maintains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

The defendant, Sharon S. Trigo, in addition to acting as Assistant District Attorney in and for the 49th Judicial District of Texas, and receiving an annual salary of $19,310.40 therefor, maintains a private practice of law and has her office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

The defendant, Francisco J. Flores in addition to acting as Tax Assessor-Collector of Webb County, Texas, and receiving an

annual salary of $19,999.92 therefor, maintains a private practice of law and has his office in the Sames-Moore Building in the City of Laredo, Webb County, Texas.

IV

Ramiro Martinez is an at all times pertinent herein was a duly appointed and acting Texas Ranger of the State of Texas, and among other counties, is and was at all times pertinent herein, assigned to Webb County, Texas.

V

For at least ten years prior to the 26th day of January, 1977, the Plaintiff was an employee of the Tax Assessor-Collector of Webb County, Texas, and worked in the office of the Tax Assessor-Collector of Webb County,



in the Webb County Courthouse Annex in the City of Laredo in Webb County, Texas.

VI

By letter dated January 26, 1977, to the Plaintiff from the defendant, Francisco J. Flores, the plaintiff was suspended with pay from her position with the Webb County Tax Assessor-Collector effective at 8:30 A. M., January 26, 1977. A copy of such letter is attached hereto, made a part hereof, incorporated herein for all purposes and marked Exhibit "A".

By letter Dated February 1, 1977, to the Plaintiff from the defendant, Francisco J. Flores, the Plaintiff's employment with the office of the Ta xAssessor-Collector of Webb County, Texas, was terminated effective

at 8:30 A. M., February 1, 1977. A copy of such letter is attached hereto, made a part hereof, incorporated herein for all purposes and marded Exhibit "B".

VII

On February 3, 1977, a complaint against the plaintiff was signed, sworn to and filed with the defendant, A. A. Alvarado, as Justice of the Peace of Webb County, Texas, for Precinct No. 1, Place 2, in Cause No. 47,749 on the docket of said Justice Court by Ranger Ramiro Martinez, charging the Plaintiff with official Misconduct under the provisions of Section 39.01 (a) (5) of the Penal Code of the State of Texas. A copy of such complaint is attached hereto, made a part hereof, incorporated herein forall purposes and marked



Exhibit "C".

VIII

On the 3rd day of February, 1977, the plaintiff voluntarily appeared with her attorneys, J. G. Hornberger and J. G. Hornberger, Jr., in the office of the said defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, at which time bond in the amount of $20,000.00 was set by the said defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, and acting under color of that office, an examining trial was set for February 21, 1977, at 10:00 A. M. Appearing at the bond setting for the office of the District Attorney wasthe defendant, Donato Ramos, acting in his capacity as Assistant District Attorney in and

for the 49th Judicial District of Texas. The Plaintiff, having been remanded to the custody of the Sheriff of Webb County, Texas, was taken to the office of said Sheriff where she was photographed and fingerprinted and where she made bail and was released.

IX

Pursuant to the setting by the defendant, A. A. Alvarado, an examining trial in said cause No. 47,749 was held in the 111th District Courtroom, Courthouse Annex, in Laredo, Texas, on the 21st day of February, 1977, at 10:00 A. M. with the defendant, A. A. Alvarado, purporting to act in his official capacity as Justice of the Peace of Webb County, Texas, Precinct No. 1, Place No. 2. Appearing with the Plaintiff were her attorneys,



J. G. Hornberger and J. G. Hornberger, Jr.

Purporting to act for the State of Texas and under color of their office were the defendants, Charles R. Borchers and Donato Ramos. Also present was the defendant, Carlos M. Zaffirini acting as counsel for the defendant, Francisco J. Flores. The plaintiff had subpoenaed the following witnesses who appeared and were sworn:

Francisco J. Flores
Arturo Villarreal
Graciela Cruz
Herlinda Rodriguez
Elma Salinas
Lucio Prado
Cruz Cabello
Nick Hernandez
Alicia Medina
Carlos Zaffirini

Prior to the commencement of the taking of testimony the plaintiff invoked the rule, and the rule was invoked as to all witnesses except

as to Ranger Ramiro Martinez and the defendant, Carlos M. Zaffirini. The defendant, Carlos M. Zaffirini, was excused at his request and that of the defendant, Charles R. Borchers, over objection of the plaintiff. The State of Texas then called its first witness, Ranger Ramiro Martinez.

After Ranger Martinez had completed his testimony, the State of Texas then rested, and the plaintiff moved the Court to dismiss the complaint for lack of evidence. Still purporting to act under the color and authority of his office and to further his efforts to deprive the plaintiff of her Constitutional rights, the defendant, Charles R. Borchers, in an argument unprecedented in the history of this state objected to the plaintiff being allowed to



make a bill of exceptions and he objected to the witnesses being placed under the rule while testimony was being taken on the bills of exceptions, all of which exceptions were sustained by the defendant, A. A. Alvarado purporting to act under the color and purported authority of his office. The defendant, Borcher further argued to the court that"probable cause" had been shown and that the plaintiff should be bound over to the Grand Jury even though the testimony of Ranger Martinez made it absolutely clear . there was no evidence whatsoever of plaintiff's guilt of the alleged offense. Also in furtherance of his efforts to deprive the plaintiff of her Constitutional rights, the defendant, Borchers, advised and conferred with the defendant, Carlos M. Zaffirini, who was

at the counsel table as counsel for the defendant, Francisco J. Flores, in an effort to prevent any evidence of the guilt of any other party of the alleged offense. The defendant, Borchers objected to the efforts of the defense counsel to showthat the offense was not only not committed by the plaintiff, but was committed by another person or persons, and such objection was upheld by the magistrate, the defendant, A. A. Alvarado. A copy of the proceeding had and testimony taken at such examining trial in attached hereto, incorporated herein, made a part hereof for all purposes and marked Exhibit "D".

X

Under the color and pretense of the statutes, ordinances, regulations, customs



and usage of the State of Texas, and purporting to act under the color and purported authority of his office as District Attorney in and for the 49th Judicial District of Texas, and with the malicious intent to subject or cause to be subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit.

1. The right not to be deprived of life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Constitution of the United States;

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property,

without due process of law;

and to cause her great mental and physical injury; and knowing that there was not sufficient evidence to cause a complaint to be issued against the plaintiff, the said defendant, Charles R. Borchers, in a determined effort to protect and assist the defendant, Francisco J. Flores, and his counsel, the defendant, Carlos M. Zaffirini, as well as the defendant, Arturo Villarreal, and otherpersons, and to cause the general public to believe that the plaintiff was solely responsible for an alleged shortage of money in the office of the Tax Assessor-Collector of Webb County, Texas, the said defendant, Charles R. Borchers, maliciously and without foundation therefor, and without causing an audit to be made of the office of the



Tax Assessor-Collector, caused the said Ranger Ramiro Martinez, to sign, swear to and file with the defendant, A. A. Alvarado, purporting to act as Justice of the Peace, the complaint attached hereto as Exhibit "C", thereby causing her to be incarcerated until the required bond was made. The conduct and acts of the defendant, Borchers, at the said examining trial, all as are hereinbefore set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore ser forth. The Plaintiff alleges that it is a fact that in performing the acts above set forth the defendant, Charles R. Borchers, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity

other than his quasi-judicial capacity; further the said defendant in performing said acts was not discharging his official duties, was not acting in his official capacity, and was not in the performance of an integral part of the judicial process. The plaintiff further alleges that the said defendant Borchers, acted in bad faith and without hope of obtaining a valid conviction, but only to protect other persons.

XI

Under the color and pretense of the Statutes, ordinances, regulations, customs and usages of the State of Texas, and purporting to act under the color and purported authority of his office as Assistant District Attorney in and for the 49th Judicial District of Texas, and with the malicious intent to subject or cause to be



subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit:

1. The right not to be deprived of life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Contitution of the United States.

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property, without due process of law:

and to cause her great mental and physical injury; and knowing that there was not sufficient evidence to cause a complaint to be issued

against the plaintiff, the said defendant, Donato Ramos, in a determined effort to protect and assist the defendant, Francisco J. Flores, and his counsel, the defendant, Carlos M. Zaffirini, as well and the defendant, Arturo Villarreal, and other persons, and to cause the general public to believe that the plaintiff was solely responsible for an alleged shortage of money in the office of the Tax Assessor-Collector, of Webb County, Texas, the said defendant, Donato Ramos, maliciously and without foundation therefor, and without causing an audit to be made of the office of the Tax Assessor-Collector, caused the said Ranger Ramiro Martinez, to sign, swear to and file with the defendant, A. A. Alvarado, purporting to act as Justice of the Peace, the complaint attached



hereto as Exhibit "C", thereby causing her to be incarcerated until the required bond was made. The conduct and acts of the defendant, Ramos, at the said examining trial, all as are hereinbefore set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore set forth. The plaintiff alleges that it is a fact that in performing the acts above set forth the defendant, Donato Ramos, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity other than his quasi-judicial capacity; further the said defendant in performing said acts was not discharging his official duties, was not in the performance of an integral part of the

Judicial process. The plaintiff further alleges that the said defendant, Ramos, acted in bad faith and without hope of obtaining a valid conviction, but only to protect other persons.

XII

Under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Texas, and purporting to act under the color and purported authority of his office as Justice of the Peace in and for Precinct 1, Place 2, of Webb County, Texas, and with the malicious intent to subject or cause to be subjected the plaintiff to the deprivation of her rights, privileges and immunities, secured to her by the Constitution and laws of the United States, to-wit:

1. The right not to be deprived of



life, liberty or property, without due process of law under the provisions of the Fifth Amendment of the Constitution of the United States;

2. The provisions of the Fourteenth Amendment to the United States Constitution providing that no state shall deprive any person of life, liberty or property, without due process of law;

and cause her great mental and physical injury and having full knowledge of the proper procedure to be followed in an examining trial the said defendant, A. A. Alvarado, refused to permit the plaintiff to put on testimony in her own behalf, refused to allow her to properly preserve her record, and bound her over to the March Term of the Grand Jury of the 49th

District Court of Webb County, Texas, on evidence clearly insufficient. The conduct and acts of the defendant, A. A. Alvarado, at the said examining trial, all as are hereinabove set forth, still acting under the color of his office were also taken to deprive the plaintiff of her Constitutional rights hereinbefore set forth. The Plaintff alleges that it is a fact that in performing the acts above set forth the defendant, Alvarado, acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity and acted in a capacity other than his quasi-judicial capacity; further the said defendant, Alvarado, in performing said acts was not discharging his official duties, was not acting in his official capacity and was not in



the performance of an integral part of the judicial process.

XIII

The plaintiff further alleges that the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whitworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal, A. A. Alvarado and Carlos M. Zaffirini, intentionally conspired and intentionally entered into a conspiracy for an unlawful purpose, to-wit: The purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Texas with the intent to deny to the plaintiff, a citizen of the United States and of the State of Texas, the equal protection of the laws, and particularly to deny her the right not to be deprived of the

rights of life, liberty or property without due process of law, in violation of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. Particularly, but not exclusively, the said defendants conspired to:

A. Cause a criminal complaint to be filed against the plaintiff without any basis therefor or hope of conviction thereunder.

B. Cause her to be incarcerated under said baseless complaint.

C. Cause her to be denied a fair and impartial examining trial, all as is provided for by the laws of the State of Texas.

D. Cause other persons suspected of the offense with which plaintiff was charged, namely the defendants,



Francisco J. Flores and Arturo Villarreal, and others to be granted unofficial but effective protection from prosecution.

E. Cause the general public and any prospective grand jury to believe through information given to the news media, that the plaintiff was solely responsible for any alleged shortage of money in the office of the Tax Assessor-Collector of Webb County, Texas.

F. To cause the plaintiff, and the plaintiff only, to be indicted for said alleged offense based on hearsay and other inadmissible evidence, primarily to protect the said defendants, Francisco J. Flores and Arturo Villarreal, and others.

G. To deprive the plaintiff of a legally constituted court for her examining trial.

H. To deprive the plaintiff of her civil rights without due process of law.

I. To accomplish an unlawful purpose through purported lawful means.

J. To judicially blackmail the plaintiff into paying shortages in the office of the Tax Assessor-Collector of Webb County, Texas, for which she was not liable or responsible in order that the persons who are liable and responsible will not have to pay said shortages.

In furtherance of and to accomplish the unlawful purpose of the conspiracy the defendants committed the following overt acts:



1. The defendant, Borchers, had a conversation with the defendant, Carlos M. Zaffirini, on or about February 1, 1977, relating to the plaintiff, Irene Perez.

1a. Shortly thereafter, the defendant, Carlos M. Zaffirini, called the plaintiff's attorney to inquire when she would make restitution.

2. The defendant, Borchers, had a conversation with Ramiro Martinez, Texas Ranger, on or about February 2, 1977.

3. The defendants, Borchers and Ramos, caused Ranger Ramiro Martinez to file a criminal complaint against the plaintiff in Criminal No. 47,749, before

the defendant, A. A. Alvarado.

4. The defendant, A. A. Alvarado, purporting to act as Justice of the Peace of Webb County, Texas, Precinct 1, Place 2, accepted the recommendation of the defendant, Donato Ramos, as to the amount of the bond.

5. The defendant, A. A. Alvarado, ordered the incarceration of the plaintiff until she made bond.

6. The defendants, Borchers and Ramos, appeared at the examining trial of the plaintiff on February 21, purportedly to represent the State of Texas.

7. The defendant, Carlos M. Zaffirini, even though he was only representing a potential witness, asked to be



excused from the rule after it was invoked at said examining trial, and the defendant, A. A. Alvarado, over the objection of the plaintiff, excused the said defendant, Carlos M. Zaffirini, from the rule.

8. The defendants, Borchers and Ramos, conferred and advised with the defendant, Carlos M. Zaffirini, during the examining trial.

9. The defendant, Borchers after presenting the evidence adduced from Ranger Martinez contended to the defendant, A. A. Alvarado, that the plaintiff should not be allowed to present evidence in her behalf. The defendant, A. A. Alvarado, sustained such

contention and bound the plaintiff over to the March Term of the 49th District Court of Webb County.

10. The defendant, A. A. Alvarado, refused to permit the plaintiff to perfect her bill of exceptions as to evidence to be adduced from her subpoenaed witnesses.

11. The defendant, A. A. Alvarado, at the suggestion of the defendant, Borchers, refused to invoke the rule as to any testimony to be taken on bills of exceptions.

12. The defendant, A. A. Alvarado, after hearing argument by the defendant, Borchers, bound the plaintiff over to the March Term Grand Jury of Webb County, Texas, even though there was presented



no evidence whatsoever of her guilt or even probate guilt.

13. The defendants, Borchers and Ramos, have refrained from causing criminal complaints to be issued against the defendant, Francisco J. Flores, who is represented by the defendant Zaffirini, and Arturo Villarreal, or other persons primarily responsible for the repayment of the shortages that are alleged to exist in the office of the Tax Assessor-Collector of Webb County, Texas.

A copy of a letter from the Comptroller of Public Accounts of the State of Texas to the Governor of the State of Texas regarding the alleged shortages and the persons liable therefor is attached hereto,

incorporated herein and made a part hereof for all purposes, and marked Exhibit "E".

In entering into and carrying out such conspiracy, the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whitworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal and A. A. Alvarado, and each of them, acted outside and beyond the scope of their authority and without authorization of law. That the said defendant, A. A. Alvarado, in conducting said examining trial acted without any jurisdiction whatsoever, did not act under authority of his office or in the exercise of his statutory duty and judicial position, and did not act in the performance of an integral part of the judicial, process, but on the contrary, as part of a pre-conceived plan or scheme to



deny the plaintiff the rights to which she is entitled under the Constitution of the United States.

That the defendants, Borchers, Ramos, Whirworth and Trigo, were acting under color of law and purported authority only, and having abandoned their quasi-judicial; that they were not performing their official duties, were not acting in an official capacity and were not in the performance of an integral part of the judicial process. Plaintiff further states that they and each of them acted in bad faith and without hope of obtaining a valid conviction.

XIV

At the time of the acts hereinabove described, the plaintiff was approximately 46

years of age (having been born April 5, 1931), was in good health, enjoyed a good reputation in the community and had a reasonable life expectancy of 29.54 years under the Standard Tables of Mortality. She was earning $608.00 per month in her position with the office of the Webb County Tax Assessor-Collector, approximately an additional $300.00 permonth for notary fees (having previously been appointed a Notary Public by the Governor of the State of Texas), and in her spare time made approximately $180.00 per month as a night clerk at a local motel. She states that, except for the unlawful acts on the part of the defendants, she would have continued to realize approximately the same income for the balance of her life. By virtue, however, of the acts



of the defendants, and each of them, by virtue of the misuse of power by the defendants, Borchers, Ramos, Whitworth, Trigo, Flores, Villarreal and Alvarado, and each of them, acting under color of their office, and by virtue of the unlawful conspiracy entered into and carried out against this plaintiff by the defendants, Charles R. Borchers, Donato Ramos, Steve A. Whirworth, Sharon S. Trigo, Francisco J. Flores, Arturo Villarreal, A. A. Alvarado and Carlos M. Zaffirini, and each of them, and as a direct and proximate result thereof, the plaintiff has suffered great physical and mental injury, humiliation and embarrassment. Additionally, plaintiff has been fired from her position with the local motel. She has made repeated attempts to secure other employment, but has been turned down because

of the unfounded charges made against her and the resulting publicity. Plaintiff states that even though she is not guilty of the charge made against her, she states that her good reputation has now been destroyed, and in all reasonable probability she will not be able to secure gainful employment for the balance of her life. That, therefore, she is entitled to compensatory damages in the sum of Four Hundred Fifty Thousand and No/100 ($450,000.00).

XV

Plaintiff further states that the acts of the defendants and each of them, as aforesaid, were done wilfully, maliciously and with callous and reckless indifference to the civil rights of this plaintiff, and therefore, she is entitled to punitive damages in the sum of



Fifty Thousand and No/100 Dollars ($50,000.00).

WHEREFORE, plaintiff prays that the defendants be cited to appear and answer herein, and that on final hearing hereof she be granted judgment against the defendants and each of them for compensatory damages in the sum of $450,000.00, for punitive damages in the sum of $50,000.00, for costs of suit and for such other and further relief, in law and in equity, to which she may be entitled.

J. G. HORNBERGER
J. G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
Attorneys for Plaintiff
AC 512 722-1121

by S/ J. G. Hornberger, Jr.
J. G. Hornberger, Jr.
Attorney-in-Charge

PLAINTIFF REQUESTS A JURY TRIAL.

AMENDED MOTION TO DISMISS

(Number and Title Omitted)

Defendants, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo, move the Court under Rule 12 (b) 6 as follows:

To dismiss the action with prejudice because the complaint fails to state a claim or action against these four defendants upon which relief can be granted. Plaintiff admits in her complaint that these Defendants are state prosecuting attorneys, and were State prosecuting attorneys, at all times material to her claim. These defendants were, and are, State prosecuting attorneys as more particularly appears from the affidavit of Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo attached hereto as Exhibit A.



In support of this motion these defendants cite the United States Supreme Court case of Imbler v Pachtman, 96 S. Ct. 984 (1976), which gives absolute immunity to State prosecuting attorneys.

These Defendants also move the Court to grant them reasonable attorneys' fees as part of the costs in this suit under Civil Rights Act, Title 42 of United States Code, Section 1989.

Respectfully submitted,
Charles R. Borchers
Donato D. Ramos
Steve A. Whitworth
Sharon S. Trigo
Attorneys at Law and
Defendants

By: /s/ Charles Borchers
One of said attorneys,
Defendant, pro se
P. O. Box 1343
Laredo, TX 78040

---

EXHIBIT A

THE STATE OF TEXAS |
COUNTY OF WEBB |

BEFORE ME, the undersigned Notary Public in and for Webb County, Texas, personally appeared Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo, each known to me to be credible persons over the age of eighteen years, who having been first duly sworn by me, upon their oaths, stated as follows:

That at all times material to the claim as alleged by Irene Perez in Civil Action L-77-15 in the United States District Court for the Southern District of Texas, Laredo Division, we were and are State prosecuting attorneys to-wit:

1) That Charles R. Borchers is the duly elected, qualified and acting District Attorney of the 49th Judicial District of Texas, which includes Webb, Dimmit and Zapata Counties.

2) That Donato D. Ramos is the duly appointed, qualified and acting First Assistant District Attorney of the 49th Judicial District of Texas.



3) That Steve A. Whitworth is a duly appointed, qualified and acting First Assistant District Attorney of the 49th Judicial District of Texas;

4) That Sharon S. Trigo is a duly appointed, qualified and acting Assistant District Attorney of the 49th Judicial District of Texas;

That those of us who participated in connection with the initiation of a criminal prosecution against Irene Perez and presenting the State's case at her examining trial, acted and participated within the scope of our duties as State prosecuting attorneys.

That a grand jury is not scheduled to convene until March 21, 1977. The last grand jury was dismissed in October, 1976.

S/ Charles Borchers
Charles Borchers
S/ Donato D. Ramos
Donato D. Ramos
S/ Steve A. Whitworth
Steve A. Whitworth

S/ Sharon S. Trigo
Sharon S. Trigo

SWORN TO AND SUBSCRIBED by the said Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo on this the 8th day of March, 1977, to certify which witness my hand and seal of office.

S/ Concepcion Wise
Notary Public, Webb County, Texas.

My commission expired June 1, 1977.

---

MOTION TO DISMISS

(Number and Title Omitted)

NOW COMES FRANCISCO J. FLORES, Individually and as Tax Assessor-Collector of Webb County, Texas, defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.



"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief." Guedry v Ford, 431 F2d 660, 5th Cir. (1970) at page 664.

"Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act." Hill v McClellan, 490 F2d 59, 5th Cir (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, cannot be held liable, since he is not conspiring with persons

acting under color of law against whom a valid claim could be stated. Watts v McGowan, 516 F 2d 203, 3 Cir (1975); Guedry v Ford, supra, Hill v McClellan, supra.

Respectfully submitted,
s/ H. C. Hall, III
H. C. Hall, III, Attorney in Charge for the Defendant, Francisco J. Flores

OF COUNSEL:
HALL AND ZAFFIRINI
511 Sames-Moore Building
Laredo, Texas 78040

---

MOTION TO DISMISS

(Number and Title Omitted)

NOW COMES CARLOS M. ZAFFIRINI, Defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.



"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and hence insufficient to constitute a basis for relief." Guedry v Ford 431 F2d 660, 5th Cir. (1970) at page 664.

Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act. " Hill v McClellan, 490 F 2d 59, 5th Cir (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Carlos M. Zaffirini cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated.

Watts v McGowan, 516 F2d 203, 3 Cir (1975); Guedry v Ford, supra; Hill v McClellan, supra.

Respectfully submitted,
s/ H. C. Hall, III
H. C. Hall, III, Attorney
in Charge for the Defendant
Carlos M. Zaffirini

OF COUNSEL:
HALL AND ZAFFIRINI
511 Sames-Moore Building
Laredo, Texas 78040

---

MOTION TO DISMISS

(Number and Title Omitted )
Filed: March 22, 1977

Defendant, A.A. Alvarado, individually and in his capacity as Justice of the Peace of Precinct 1, Place 2, Webb County, Texas, hereinafter called Defendant, moves the Court under Rule 12 (b) 6, F.R.C.P., to dismiss this civil action based on one or more of the following grounds:

1. Defendant is immune from suit and



from liability for damages under 42 U.S.C. 1983, 1985, 1986, and 1988.

2. Defendant was at all times material to Plaintiff's complaint and still is a Justice of the Peace as more particularly appears from the affidavit of Defendant A.A. Alvarado attached hereto as Exhibit A. Plaintiff Irene Perez, hereinafter called Plaintiff, in her complaint admits such fact.

3. Defendant relies on the judicially recognized doctrine of absolute immunity from liability in civil rights actions for all judicial acts performed within the jurisdiction and scope of authority of a judge.

4. Plaintiff has failed to state a claim upon which relief can be granted.

5. Plaintiff's complaint is barren of any allegation that Defendant played any role other than that of Justice of the Peace under the laws

of the State of Texas, at all times material to Plaintiff's complaint.

WHEREFORE, premises considered, Defendant herein prays that Plaintiff's complaint be in all things dismissed, that Defendant have his costs including reasonable attorney's fees and for such other and further relief to which Defendant herein may be entitled either in equity or at law.

FANSLER, REESE & PALACIOS
1800 Victoria
Laredo, Texas 78040

by s/ Morris M. Reese, Jr.
Morris M. Reese, Jr.
Attorney in Charge for
Defendant

Sworn to and subscribed before me by the said Morris M. Reese, Jr., this the 21st day of March, 1977.

/s/ Rose Marie Ann Herbst
Notary Public, Webb County, Texas.



EXHIBIT A

THE STATE OF TEXAS |
COUNTY OF WEBB. |

BEFORE ME, the undersigned Notary Public in and for Webb County, Texas, personally appeared A. A. Alvarado, known to me to be a credible person over the age of eighteen years, who having been first duly sworn by me, upon his oath, stated as follows:

That as to all matters contained in and at all times material to the claim alleged by Plaintiff Irene Perez in Civil Action L-77-15 in the United States District Court for the Southern District of Texas, Laredo Division, entitled IRENE PEREZ V. CHARLES R. BORCHERS, ET AL, I was and still am Justice of the Peace of Precinct 1, Place 2, Webb County, Texas, more specifically:

1) That I, A. A. Alvarado am the duly

elected, qualified and acting Justice of the Peace of Precinct 1, Place 2, Webb County, Texas.

2) That I acted pursuant to my judicial authority as Justice of the Peace under the laws of the State of Texas and within my jurisdiction as Justice of the Peace under said laws in all matters including the setting of bond on criminal complaint No. 47,749 filed in my Court against the Plaintiff on or about February 3, 1977 and to the holding and conducting of an examining trial in my court on the said complaint on or about February 21, 1977.

3) That I have not acted other than in my role as Justice of the Peace in regard to Plaintiff or the complaint against her.

S/ A.A. Alvarado
A.A. Alvarado

Sworn to and subscribed by the said A.A. Alvarado, on this 18th day of March, 1977, to certify which witness my hand and seal of



office.

S/ Rose Marie Ann Herbst
Notary Public, Webb County, Texas.

---

MOTION TO DISMISS

(Number and Title Omitted)

Filed March 31, 1977

NOW COMES ARTURO VILLARREAL, individually and as Deputy Tax Assessor-Collector of Webb County, Texas, defendant, and moves this Honorable Court to dismiss the complaint filed herein on the grounds that said complaint fails to state a claim upon which relief can be granted.

"Plaintiff's allegation that a conspiracy existed between the defendants is conclusionary in nature and unsupported by any pleaded facts and

hence insufficient to constitute a basis for relief." Guedry v Ford, 431 F2d 660, 5th Cir (1970) at page 664.

"Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act." Hill v McClellan, 490 F2d 59, 5th Cir. (1974).

Defendants Alvarado, Borchers, Ramos, Whitworth and Trigo are entitled to judicial and prosecutorial immunity; accepting plaintiff's allegations as true for the sake of argument, same being expressly denied, the defendant Arturo Villarreal, individually and as Deputy Tax Assessor-Collector of Webb County, Texas, cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. Watts v McGowan, 516 F2d 203, 3 Cir (1975); Guedry v



Ford, supra; Hill v McClellan, supra.

Respectfully submitted,

s/ H. C. Hall, III
H. C. Hall, III, Attorney in Charge for the Defendant Arturo Villarreal

of counsel

Hall & Zaffirini
511 Sames-Moore Building
Laredo, Texas 78040

ORDER

(Number and Title Omitted)

Filed April 27,1977

On this the 27th day of April, 1977, came on to be heard the motion to Dismiss of the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, and the Court being of the opinion that same should be (granted) (denied);

It is therefore ORDERED that the Motion to Dismiss of the defendant Francisco J. Flores, Individually and as Tax Assessor-Collector of Webb County, Texas, be and is hereby (granted)(denied).

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE



ORDER

(Number and Title Omitted)

Filed April 27, 1977

On this the 27th day of April, 1977, came on to be heard the Motion to Dismiss of the Defendant Carlos M. Zaffirini, and the Court being of the opinion that same should be granted)(denied);

It is therefore ORDERED that the Motion to Dismiss of the defendant Carlos M. Zaffirini be and is hereby (granted) (denied).

SIGNED at Laredo, Texas this the 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
Robert O'Conor, Jr.
United States District Judge

ORDER OF DISMISSAL

(Number and Title Omitted)

Filed April 27, 1977

This cause came on for hearing on the 27th day of April, 1977, on the Motion of Defendant, A. A. Alvarado, to dismiss the action because the complaint fails to state a claim against said defendant upon which relief can be granted, and the Court having heard the argument of counsel and being fully advised, accordingly,

IT IS ORDERED that the motion of Defendant, A. A. Alvarado be granted, and that the complaint be and it is hereby dismissed with prejudice as to Defendant, A. A. Alvarado.

SIGNED this 27th day of April, 1977.

/s/ Robert O'Conor
Robert O'Conor, Jr.
United States District Judge



ORDER

(Number and Title Omitted)

Filed April 27, 1977

On this the 27th day of April, 1977, came on to be heard the Motion to Dismiss of the Defendant Arturo Villarreal, Individually and as Deputy Tax Assessor-Collector of Webb County, Texas, and the Court being of the opinion that same should be (granted) (denied)

It is therefore ORDERED that the Motion to Dismiss of the defendant Arturo Villarreal, Individually and as Deputy Tax Assessor-Collector of Webb County, Texas, be and is hereby (granted) (denied).

Signed at Laredo, Texas, this 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE

ORDER

(Number and Title Omitted)

Filed April 27, 1977

This cause came on for consideration on the 27th day of April, 1977, on the motion of Defendant, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth, and Sharon S. Trigo, to dismiss the action because the complaint fails to state a claim against said defendants upon which relief can be granted, and the Court having considered all papers filed herein and being fully advised, it is.

ORDERED that the Motion of Defendants, Charles R. Borchers, Donato D. Ramos, Steve A. Whitworth and Sharon S. Trigo to dismiss is granted.

Signed at Laredo,Texas,this 27th day of April, 1977.

/s/ Robert O'Conor,Jr.
ROBERT O'CONOR, JR.
UNITED STATES DISTRICT JUDGE



NO. 77-2051

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

| | | |
|---|---|---|
| IRENE PEREZ, Appellant | X | APPELLEES' MOTION TO TAKE JUDICIAL NOTICE AND TO AUGMENT RECORD ON APPEAL |
| VS | X | |
| CHARLES R. BORCHERS, ETC., ET AL Appellees | X | |

COMES NOW CHARLES R. BORCHERS, DONATO RAMOS, STEPHEN A. WHITWORTH and SHARON S. TRIGO, Appellees in the above styled and numbered cause, and show the Court that heretofore, on the 29th day of March, 1977, Appellant was indicted by the Grand Jury for the 49th District Court of Webb County, Texas, in Cause No. 16,868, styled The State of Texas v. Irene Perez, of the offense alleged in the Complaint upon which this action is based; that on the 28th day of July, 1977, Appellant herein was tried on such indictment by a jury in Cause Number 16,868 in said Court; that the trial resulted

in a verdict of guilty; that the Court entered judgment in accordance with the verdict of the jury; that certified copies of said indictments and judgment are attached hereto as Exhibits A through M; and that all of the said indictments and judgment reflect events which are material to this Cause but which occurred after the Order of Dismissal from which this Appeal is taken was entered by the trial court and hence were not made a part of the record of the proceedings therein.

Appellees hereby move this Court to take judicial notice of said indictments and said judgment and to Order the Record on appeal augmented by the inclusion therein of said indictments and judgement attached to this motion.

WHEREFORE, Appellees respectfully move this Court to take judicial notice of said judgment and indictments and to authorize



and order that the Record on Appeal herein be augmented by the inclusion therein of the certified copies of the indictments and judgment attached to this motion.

/s/
CHARLES R. BORCHERS

/s/
DONATO D. RAMOS

/s/
STEPHEN A. WHITWORTH

/s/
SHARON S. TRIGO
APPELLEES, Pro Se

CERTIFICATE OF SERVICE

I, certify that a copy of the above and foregoing Appellees' Motion to Take Judicial Notice and to Augment Record on Appeal was mailed to J. G. Hornberger and J. G. Hornberger, Jr., 915 Victoria Street, Laredo, Texas 78040, Attorneys for Appellant;

Horace C. Hall, Hall & Zaffirini, 511 Sames-Moore Building, Laredo, Texas 78040, attorney for the defendants-appellees, Francisco J. Flores, Carlos M. Zaffirini and Arturo Villarreal; and to Mr. Morris M. Reese, Jr., Fansler, Reese & Palacios, 1800 Victoria, Laredo, Texas, 78040, attorney for the defendant-appellee, A.A. Alvarado, on the 16th day of November, 1977.

/s/
CHARLES R. BORCHERS



EXHIBIT 'A'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 24th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availabilityof a governmental record of the tenor following:

(Motor Vehicle Sales Tax
Receipt Omitted)

with the intent to harm another, namely, the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths

aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 24th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax
Receipt Omitted)

with the intent to harm another, namely, the State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury



EXHIBIT 'B'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that or or about the 24th day of April, 1974, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there as a public servant, to-wit: a deputy tax assessor collector for Webb County, Texas, and with intent to obtain a benefit for herself, to-wit: current money of the United States of America, knowingly secreted a thing of value belonging to the government, to-wit: current money of the United States of America belonging to Webb County, Texas, that had come into her custody by virtue of her employment with

intent to misapply it, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'C'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 24th day of June, A.D., 1976, and anterior to the presentment of this Indictment, in the Count and State aforesaid IRENE PEREZ, did, then and there as a public servant, to-wit: a deputy tax assessor collector for Webb County, Texas, and with intent



to obtain a benefit for herself, to-wit: current money of the United States of America, knowingly secreted a thing of value belonging to the government, to-wit: current money of the United States of America belonging to Webb County, Texas, that had come into her custody by virtue of her employment with intent to misapply it, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'D'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn, and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present

in and to said Court that on or about the 24th day of August A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there as a public servant, to-wit: a deputy tax assessor collector for Webb County, Texas, and with intent to obtain a benefit for herself, to-wit: current money of the United States of America, knowingly secreted a thing of value belonging to the government, to-wit: current money of the United States of America belonging to Webb County, Texas, that had come into her custody by virtue of her employment with intent to misapply it, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury



EXHIBIT 'E'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 4th day of November A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there as a public servant, to-wit: a deputy tax assessor collector for Webb County, Texas, and with intent to obtain a benefit for herself, to-wit: current money of the United States of America, knowingly secreted a thing of value belonging to the government, to-wit: current money of the United States of America belonging to Webb

County, Texas, that had come into her custody by virtue of her employment with intent to misapply it, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'F'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, atthe March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 24th day of April, A.D. 1974, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the



availability of a governmental record of the tenor following;

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely the County of Webb, State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'G'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 25th day of April, A.D. 1974, and anterior to the presentment of this

Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely the County of Webb, State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'H'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present



in and to said Court that on or about the 12th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely, the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 12th day of August, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionaly impair, by withholding, the availiability of a governmental records of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely,



the State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'I'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 8th day of September, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availablity of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt
Omitted)

with the intent to harm another, namely,

the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 8th day of September, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt
Omitted)

with the intent to harm another, namely, the State of Texas, against the peace and dignity of the State.



/s/ Jose A. Gutierrez
Foreman of the Grand Jury

---

EXHIBIT 'J'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 29th day of September, A.D. 1976 and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt
Omitted)

with the intent to harm another, namely,

the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 29th day of September, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely, the State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury



EXHIBIT 'K'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 4th day of November, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely, the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 4th day of November, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

wth the intent to harm another, namely, the State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury



EXHIBIT 'L'

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Webb, State of Texas, at the March term, 1977, of the 49th District Court of said County, upon their oaths present in and to said Court that on or about the 4th day of November, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid IRENE PEREZ did, then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely, the County of Webb, State of Texas,

COUNT II

AND THE GRAND JURORS upon their oaths aforesaid in said County and State, at said term, do further present in and to said Court that on or about the 4th day of November, A.D. 1976, and anterior to the presentment of this Indictment, in the County and State aforesaid, IRENE PEREZ, did then and there intentionally impair, by withholding, the availability of a governmental record of the tenor following:

(Motor Vehicle Sales Tax Receipt Omitted)

with the intent to harm another, namely, the State of Texas, against the peace and dignity of the State.

/s/ Jose A. Gutierrez
Foreman of the Grand Jury



NO. 16,868

IN THE DISTRICT COURT
49TH JUDICIAL DISTRICT
WEBB COUNTY, TEXAS
JUNE TERM, A.D. 1977

| | | |
|---|---|---|
| THE STATE OF TEXAS | I | |
| VS. | I | ORDER |
| IRENE PEREZ | I | |

On this 12th day of October, A.D. 1977, came on to be heard the Motion in Arrest of Judgment filed by defendant, Irene Perez. Defendant appeared through her attorney and the State appeared through her District Attorney. After hearing evidence and arguments of counsel on both sides, the Court is of the opinion that the Motion in Arrest of Judgment should be granted to the extent that the condition of probation numbered thirteen (13) in the judgment of conviction this Court signed September 20, 1977, which reads as

follows: "13. Restitution in the dollar amount of missing Forms 31, Tax Receipts, turned in by the defendant, Irene Perez, as reflected by the evidence in this case" should be deleted and tha t the following condition should be substituted in its place: "13. No restitution is to be made pending the outcome of civil action No. 30,429 in the 111th District Court of Webb County, Texas, dealing with the same subject matter." In all other respects, defendant's Motion in Arrest of Judgment should be denied.

IT IS THEREFORE ORDERED and DECREED by this Court that the condition of probation numbered thirteen (13) in the judgment of conviction of this Court dated September 20, 1977, be, and it is hereby deleted, and the following condition is hereby substituted in its place: "13. No Restitution



is to be made pending the outcome of civil action No. 30,429 in the 111th District Court of Webb County, Texas, dealing with the same subject matter."

IT IS FURTHER ORDERED and DECREED that all other relief sought by defendant in her Motion in Arrest of Judgment, not specifically granted herein, is hereby denied.

SIGNED and ENTERED this 12th day of October, A.D. 1977.

/s/
E. JAMES KAZEN
Judge of the 49th Judicial District
Court of Webb County, Texas

EXHIBIT 'M

NO. 16, 868

IN THE DISTRICT COURT
49TH JUDICIAL DISTRICT
WEBB COUNTY, TEXAS
JUNE TERM, A.D. 1977

THE STATE OF TEXAS X

VS. X PROBATED JUDGMENT

IRENE PEREZ X JULY 28TH., A.D. 1977

On this, the 25th day of July, A.D. 1977, the above numbered and entitled cause was regularly reached and called for trial, when came the State of Texas by her District Attorney and the defendant, Irene Perez, appeared in person and by her attorney, and both parties announced ready for trial, and the defendant in open Court pleaded not guilty to the charge contained in the Indictment; thereupon a jury, to-wit: M.T. Longoria, and eleven others, was duly selected, impaneled and sworn to try said issue, and thereafter, on the 26th day



of July, A.D. 1977, said jury who, having heard the Indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard the argument of counsel, retired in charge of the proper officer to consider their verdict, and afterwards, on the 28th day of July, A.D. 1977, were brought into open Court by the proper officer, the defendant and her counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the jury, find the defendant guilty as charged in the indictment.

/s/M. T. Longoria
Foreman of the Jury

Thereupon the defendant elected to have her punishment assessed by the jury and such jury was called back into the box and heard evidence relative to the question of punishment and thereafter they retired to consider such question and after having duly deliberated, they returned into Court the following verdict, to-wit:

"We, the jury, having found the defendant guilty as charged in the indictment, and the defendant having elected to have the same jury assess the punishment, we, the jury, now assess her punishment at confinement in the Texas Department of Corrections for a term of 5 years, and in addition to such confinement, assess a fine of $5,000.00; and we do further find from the evidence that the defendant has never



before been convicted of a felony in this or any other State, and we do recommend that the imposition of her sentence be suspended and that she placed on probation under the further orders of this Court, as to the prison term only.

/s/ M. T. Longoria
Foreman of the Jury"

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the defendant, Irene Perez, is guilty of the offense of Tampering With Governmental Record, Count II, Felony 3, as found by the jury, and that her punishment has been set by confinement in the Texas Department of Corrections for a term of five (5) years, and that the State of Texas do have and recover of and from said defendant all costs in this proceeding incurred, for which let execution issue.

However, on the finding by the jury that the defendant, Irene Perez, is eligible for probation and on the recommendation of the jury that the imposition of the sentence be suspended and that the defendant be placed on probation,

IT IS THEREFORE, FURTHER ORDERED by the Court that the imposition of the sentence in this cause be, and the same is hereby suspended during the good behavior of the defendant and the defendant be and is hereby placed on probation for a term of five (5) years, beginning on this date, July 28, 1977, under the supervision of the Court and the duly appointed and acting Adult Probation Officer of the 49th Judicial District Court of Webb County, Texas, or his successors in office, subject to the following conditions of



probation, viz: that during the term of probation, the defendant shall:

1. Neither commit nor be convicted of any offense against the law of the State of Texas, any other State or of the United States;

2. Avoid injurious or vicious habits and abstain from the use of narcotic drugs in any form and the use of alcoholic beverages to excess;

3. Avoid places and persons of harmful or disreputable character, including places where narcotic drugs are possessed, sold or used and not associate with persons who possess, sell or use narcotic drugs, and not associate with persons of criminal record;

4. Obtain and keep gainful employment in a lawful occupation;

5. Report to the 49th District Court of Webb Cunty, Texas, on the 10th of each month;

6. Permit the Adult Probation Officer, or his assistants, to visit her at her home or elsewhere;

7. Remain within Webb County, Texas unless permitted to depart by the Court and/or by the Adult Probation Officer;

8. Not leave the State of Texas, without the consent of this Court;

9. Support her dependents that she now has or that she may acquire during the term of this probation;

10. Report any change of address, change of job, or arrest to the Adult Probation Office within forty-eight hours;

11. Pay $5,000.00 dollars Fine plus $54.00 dollars Court Costs within the next twenty-four hours from this date,



July 28, 1977.

12. Pay $10.00 dollars monthly probationary fee.

13. Restitution in the dollar amount of missing Forms 31, Tax Receipts, turned in by the defendant, Irene Perez, as reflected by the evidence in this case.

SIGNED and ENTERED this 20th day of September, A.D. 1977.

/s/
E. JAMES KAZEN
Judge of the 49th Judicial District Court of Webb County, Texas.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 77-2051

---

IRENE PEREZ,
Plaintiff-Appellant,

versus

CHARLES R. BORCHERS, ETC., ET AL,
Defendants-Appellees.

- - - -

Appeal from the United States District Court for the Southern District of Texas

- - - -

O R D E R :

IT IS ORDERED that appellees' motion to take judicial notice and to augment record on appeal is GRANTED

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

Supreme Court, U. S.
FILED
JUL 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

NO. 77-1749

---

IRENE PEREZ,
Petitioner

VS.

CHARLES BORCHERS,
Individually and as
District Attorney in
and for the 49th
Judicial District of
Texas, et al
Respondents

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

# MEMORANDUM OF LAW IN OPPOSITION FOR RESPONDENT A. A. ALVARADO

---

MORRIS M. REESE, JR.
FANSLER, REESE & PALACIOS
P. O. Box 276
Laredo, Texas 78040

Attorney for Respondent
A. A. Alvarado

INDEX


QUESTION PRESENTED . . . . . 1

POINTS AND AUTHORITIES . . . . . 2

CONCLUSION . . . . . 22

CITATIONS . . . . . i

CASES

Federal

(Supreme Court)

Monroe v. Pape
365 U.S. 167, 81 S.Ct. 473,
5 L.Ed.2d 492 (1961) . . 5

Pierson v. Ray
386 U.S. 547, 18 L.Ed.
2d 288, 87 S.Ct. 1213
(1967) . . . . . 4,17,18

Younger v. Harris
401 U.S. 36, 91 S.Ct. 746
27 L.Ed.2d 669
(1971) . . . . . 21

(Circuit Courts)

Anderson v. Sixth Judicial
District Court of St. Louis
County, State of Minnesota
521 F.2d 420 (8th Cir.
1975) . . . . . 10





Bonner v. Circuit Court
of City of St. Louis, Mo.
526 F.2d 1331 (8th Cir.
1975) cert. denied 96
S.Ct. 1418, 424 U.S. 946,
47 L.Ed.2d 353
rehearing denied
96 S.Ct. 1525,
425 U.S. 926,
47 L.Ed.2d 773 . . . . . 22

Cadena v. Perasso
498 F.2d 383 (9th Cir.
1974) . . . . . 5,20

Carmack v. Gibson
363 F.2d 862 (5th Cir.
1966). . . . . 4

Duba v. McIntyre
501 F.2d 590 (8th Cir.
1974) cert. denied
96 S.Ct. 1480, 424 U.S. 975,
47 L.Ed.2d 745
(1976) . . . . . 21

Economy Food and Liquor Co.
v. Frankfort Distillers
232 F.2d 410 (7th Cir.
1956) . . . . . 3

Gregory v. Thompson
500 F.2d 59 (9th Cir.
1974). . . . . 4

Hampton v. City of Chicago
484 F.2d 602 (7th Cir.
1973) cert. denied
415 U.S. 917,
39 L. Ed.2d 471,
94 S.Ct. 1413 . . . . . 5

Hill v. McClellan
490 F.2d 859 (5th Cir.
1974) . . . . . 4

Pauling v. McElroy
278 F.2d 252,
107 U.S. App.D.C. 372
(1960) cert. denied
364 U.S. 835,
81 S.Ct. 61,
5 L.Ed.2d 60 . . . . . 5

Robichaud v. Ronan
351 F.2d 533 (9th
Cir. 1965) . . . . . 5

Smart v. Jones
530 F.2d 64 (5th Cir.
1976) rehearing denied
532 F.2d 1375 . . . . . 14

U.S. v. King
482 F.2d 768 (D.C. Cir.
1973) . . . . . 14

(District Courts)

Camero v. Kostos
253 F.Supp. 331 (D.C.
N.J. 1966) . . . . . 5

Clark v. Zimmerman
394 F.Supp. 1166 (M.D.
Pa. 1975) . . . . . 22

Danner v. Moore
306 F.Supp. 433 (W.D.
Pa. 1969) . . . . . 18

Gilliland v. Hyder
278 F.Supp. 189 (E.D.
Tenn. 1967) . . . . . 5,19

Pitt v. Coxe
65 F.R.D.355 (E.D.
Pa. 1975) . . . . . 6



Smith v. McCann
381 F.Supp 1027 (E.D.
Wis. 1974) . . . . . 17

Thompson v. Montemuro
383 F.Supp. 1200
(E.D.Pa. 1974) . . . . . 5,20

Wade v. Bethesda Hospital
337 F.Supp. 671
(S.D.Oh. 1971) . . . . . 10,21

State

Bullard v. State
533 S.W.2d 812 (Tex.
Crim. App. 1976) . . . . 14

Trantham v. Slaughter
405 S.W.2d 206 (Tex.
Civ. App. - Eastland
1966, no writ) . . . . . 14

STATUTES

42 U.S.C.A. §§1983, 1985,
1986, 1988 . . . . . 2,18,19

Tex. Code. Crim. Proc. Ann.
Art. 2.09 (1977) . . . . 13
Art. 15.17 (1977). . . . 13
Art. 16.01 (1977). . . . 13,14
Art. 17.05 (1977). . . . 13
Art. 36.03 (Supp. 1978). 14

RULES

Fed. R. Civ. P. 8(a). . . . 2

Fed. R. Civ. P. 9(b). . . . 2

Fed. R. Civ. P. 12(b)(6). . 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

NO. 77-1749

---

IRENE PEREZ,
Petitioner

VS.

CHARLES R. BORCHERS, Individually and as District Attorney in and for the 49th Judicial District of Texas, et al
Respondents

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

MEMORANDUM OF LAW IN OPPOSITION FOR RESPONDENT A. A. ALVARADO

---

QUESTION PRESENTED

Can a Motion to Dismiss for failure to state a claim be granted by the trial court on the pleadings alone based on judicial immunity?

ARGUMENT ON POINTS AND AUTHORITIES

I.

A Motion to Dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b) (6) directs the Trial (District) Court's inquiry to an issue of law, i.e., whether or not well plead facts in Petitioner Perez' Original Complaint constituted allegations upon which relief could be granted. FED. R. CIV. P. 8(a) and 9(b) set out the requirements for a statement of the claim made by Petitioner under 42 USCA §§ 1983, 1985.

Respondent Judge A. A. Alvarado in his Motion to Dismiss challenged not only the legal sufficiency of Petitioner's Original Complaint, but more importantly also negated the unlikely possibility of her proving a cause of action for which relief could be granted. It is

submitted that challenging such sufficiency is proper by way of a Motion to Dismiss, which procedure does not admit that the Judge is liable thereunder. Economy Food and Liquor Co. v. Frankfort Distillers Corp., 232 F.2d 410 (7th Cir. 1956). Without the requirement of a responsive pleading, Petitioner Perez' Original Complaint showed that Respondent A. A. Alvarado was at all times sitting as a judicial officer within his jurisdiction. Allegations that he acted in his individual capacity were mere conclusions. Unlike other cases where Petitioner is in need of discovery to develop facts and of time to properly plead, in this case, all the facts were before the Trial Court in the form of Exhibits, to-wit, Exhibit D of Petitioner's Original Complaint consisting of the Statement of Facts of the preliminary examining trial giving rise to her com-



plaint. Thus the Court was in a position to examine all the facts whether or not plead.

Respondent Judge Alvarado by preliminary motion before the Trial Court below raised the doctrine of judicial immunity. As a Justice of the Peace, he relied on the doctrine of judicial immunity elucidated in Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967) not merely in his defense, but more importantly, as a plea to bar the trial itself. Under the circumstances, Respondent Judge A. A. Alvarado is entitled to a dismissal of the claim for damages under a civil rights suit. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), Carmack v. Gibson, 363 F.2d 862 (5th Cir. 1966), Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974).

Judicial immunity has not been an issue on review that Courts have hesitated

to determine solely on the pleadings. Gilliland v. Hyder, 278 F.Supp. 189 (E.D. Tenn. 1967), Cadena v. Perasso, 498 F.2d 383 (9th Cir. 1974), Thompson v. Montemuro, 383 F.Supp. 1200 (E.D. Pa. 1974), unlike review of the actions of law enforcement officers as in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), or Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) cert. denied, 415 U.S. 917, 39 L.Ed.2d 471, 94 S.Ct. 1413, Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

While all material allegations of well pleaded facts (when, how, to whom and with what results) in the complaint must be taken as true, these admissions do not extend to inferences, arguments or legal conclusions. Pauling v. McElroy, 278 F.2d 252, 107 U.S.App.D.C. 372 (1960) cert. denied 364 U.S. 835, 81 S.Ct. 61, 5 L.Ed.2d 60; Camero v. Kostos, 253 F.Supp. 331 (D.C.N.J. 1966).



There are important considerations present in this case to apply to the traditionally liberal rules of federal pleading. Petitioner Perez' complaint is not in the nature of pro se pleading but one drawn up by attorneys who represented her at the various stages of the State criminal proceedings. The complaint includes conclusory allegations not because of lack of drafting skills, but because the underlying facts fell short of stating a claim. Additionally, Petitioner did not choose to replead against any of the Respondents either after the Motions to Dismiss had been filed or granted.

This distinguishes the case of Pitt v. Coxe, 65 F.R.D. 355 (E.D. Pa., 1975) relied on by Petitioner, since in that case not only were the pleadings pro se, but the circumstances did not show beyond a doubt that defendant could not prove proper facts. Therein, a Justice of the

Peace had allegedly offered the Defendant a choice of imprisonment while awaiting an unscheduled hearing or the immediate payment of money on an unspecified criminal complaint. Nonetheless, the Court did dismiss the §§1985-1986 counts for lack of averred facts to support conclusory allegations, while allowing repleading on the §1983 action as to a rather blatant set of circumstances.

Petitioner Perez did not and cannot allege well plead facts to show that Respondent Judge Alvarado during the filing of the complaint and the bond setting or in the rulings during the examining trial against her (the two distinct time frames covered by the complaint) was engaging in other than judicial acts. Neither did she allege well plead facts that these judicial acts were in excess of his jurisdiction or in clear absence of it.



Petitioner Perez set out the conclusory allegations that Respondent Judge Alvarado:

(1) ". . . acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity: further (that) the said Judge Alvarado, in performing said acts was not discharging his official duties was not acting in his official capacity and was not in the performance of an integral part of the judicial process" (Petition for Writ App. 34).

(2) "in conducting said examining trial acted without any jurisdiction whatsoever, did not act under authority

of office or in the exercise of his statutory duty and judicial process, but on the contrary, as a part of a preconceived plan or scheme to deny the [Arrestee Perez] the rights to which she is entitled under the Constitution of the United States." (Petition for Writ App. 44).

(3) caused Petitioner Perez to be denied a fair and impartial examining trial and a legally constituted court (Petition for Writ App. 36, 38), to be bound to the next term of the State grand jury without evidence of probable guilt (Petition for Writ App. 42-43) and used lawful means to accomplish an unlawful purpose (Petition for Writ App. 38).



There are no facts alleged or that can be alleged which show Judge Alvarado transcended the bounds of his jurisdiction.

In terms of judicial immunity, jurisdiction means that the Judge must have jurisdiction over the person and the subject matter as well as the power to render the particular decision involved, if he is to be immune from suit for an act performed in his judicial capacity. Wade v. Bethesda Hospital, 337 F.Supp. 671 (S.D.Oh. 1971).

Conclusory allegations that a judge was acting in clear absence of jurisdiction i.e. outside his judicial capacity, have been held to fail to state a claim under the civil rights statutes. Anderson v. Sixth Judicial District Court, St. Louis County, State of Minnesota, 521 F.2d 420 (8th Cir. 1975).

II.

Respondent Judge Alvarado takes the position in his Motion to Dismiss (see

Record and Petition for Writ App. 58-62), that Petitioner Perez in her complaint admitted that at all critical junctures of the alleged conspiracy and alleged deprivation of civil rights, Judge Alvarado

> ". . . is and at all times pertinent herein was the duly elected, qualified and acting Justice of the Peace in and for Precinct 1, Place 2, of Webb County, Texas" (Petition for Writ App. 13).

Ironically, Petitioner Perez and her attorneys appeared voluntarily before Judge Alvarado for the bond setting, made bail securing Perez' release, and again appeared for the examining trial before Judge Alvarado (Petition for Writ App. 19), never once challenging the jurisdiction of Judge Alvarado on any basis or making any offer of proof. There is no event



or act, surreptitious or otherwise plead in the complaint which triggered the allegations of conspiracy and deprivation of constitutional rights, privileges and immunities other than for the judicial rulings of the magistrate during the time frame alleged, e.g.:

1. Sustaining the objections of District Attorney Borchers as to Petitioner Perez' request to perfect a bill of exceptions and as to witnesses being placed under the rule-TEX. CODE CRIM. PROC. ART. 36.03 (Supp. 1978)-during testimony for the bill of exceptions (Petition for Writ App. 23);
2. Sustaining the objections of District Attorney Borchers to Petitioner Perez' attempts to show the offense was committed not only by Petitioner

Perez, but by other persons. (Petition for Writ App. 24).

Respondent Judge Alvarado was the magistrate at the time of arrest of Perez (Petition for Writ App. 19-20), TEX. CODE CRIM. PROC. ANN. ART. 2.09 (1977), and pursuant to the authority of TEX. CODE CRIM. PROC. ANN. ART. 15.17 (1977), he accepted the filing of the State Criminal Complaint against Petitioner Perez and set the amount of her bond. TEX. CODE CRIM. PROC. ANN. ART. 17.05. (1977)

Judge Alvarado was the magistrate in the examining trial of Petitioner Perez (Petition for Writ App. 20-24) and pursuant to the authority of TEX. CODE CRIM. PROC. ANN. ART. 16.01 et seq. (1977) bound Petitioner Perez to the next regular term of the State grand jury. (Petition for Writ App. 42) During the conduct of an examining trial, the magistrate exercises discretion to excuse witnesses who



testify from being placed under the rule of being excluded from the hearing room. TEX. CODE CRIM. PROC. ART. 36.03 (Supp. 1978). Texas Criminal Practice and Procedure TEX. CODE CRIM. PROC. ANN. ART. 16.01 et seq. extends to an accused like Petitioner Perez the right to request preliminary examining trial, but such right ends upon the return of an indictment by a State Grand Jury. Bullard v. State, 533 S.W.2d 812, (Tex. Crim. App. 1976). That Petitioner Perez was not allowed to present additional witnesses under a bill of exceptions (Petition for Writ App. 33 and Exhibit D to Petitioner's Original Complaint) are the results of judicial acts supported by Trantham v. Slaughter 405 S.W.2d 206 (Tex. Civ. App.--Eastland 1966 no writ) but in any event reviewable in the usual criminal trial procedure that follows indictment. U.S. v. King, 482 F.2d 768 (D.C. Cir. 1973).

In Petitioner's allegations against Respondent Judge Alvarado of deprivation of her civil rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, Petitioner complains of judicial acts. In her allegations of conspiracy to deprive her of the same said rights she juxtaposes overt acts which are merely the usual and necessary contacts between judge, prosecutor, staff, counsel and witnesses in the processing of a criminal case, to-wit:

The actions of Judge Alvarado in accepting for filing the complaint against Petitioner Perez, (Petition for Writ App. 39); setting the amount of bond on Arrestee Perez, accepting Assistant District Attorney Ramos' recommendation as to bond amount and causing Petitioner Perez to face incarceration if she did not make bond, (Petition for Writ App. 40).

The aforementioned are judicial acts as heretofore defined by state statute



supra, or the natural consequences thereof as set out below.

Petitioner's further conclusory allegations are that Tax Assessor-Collector Flores, his deputy Villarreal, and unnamed others were granted unofficial but effective protection from prosecution (Petition for Writ App. 36-37), that news media information given to the general public and prospective grand jury members was intended to show that Petitioner Perez was solely responsible for the offense, (Petition for Writ App. 37) and that Petitioner Perez was judicially blackmailed to account for the shortages in her former place of employment (Petition for Writ 38).

Again these allegations were couched in terms of a conspiracy to cause these things to happen, but there were no words, gestures, or acts on the part of Judge Alvarado underlying these pleadings other than for judicial acts already discussed.

Harms that are incidental to any criminal proceeding brought lawfully and in good faith are not the basis of a civil rights complaint. Smith v. McCann 381 F. Supp. 1027 (E.D. Wis. 1974).

Any Arrestee in the precarious position of Petitioner Perez facing conviction in state criminal courts could make these conclusory allegations in federal civil actions.

III.

Thus, the essential purpose of the doctrine of judicial immunity from suit is served by giving the judge freedom to exercise his discretion and to perform his official duties without fear of subjecting himself to personal liability, because of a Defendant's speculation about the motivation behind a particular decision. The essence of the doctrine is embodied in Pierson, supra at p. 1217:

". . . Few doctrines were more solidly established at



common law than the immunity of judge from liability for damages for acts committed within their judicial jurisdiction . . . [it is] . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. . ."

The passage of 42 USCA 1983 did not abrogate the common law rules of judicial immunity from liability for damages as there is a continuing public interest that judges be unfettered in the exercise of their judicial function. Pierson supra.

Judicial immunity is not lost by solely allgeging conspiracy with others who may not claim such defense. Danner v. Moore, 306 F.Supp. 433 (W.D.Pa. 1969).

The immunity of a judicial officer acting within the scope of his jurisdiction is so absolute and well established that it covers a myriad of situations.

In Smart v. Jones, 530 F.2d 64, (5th Cir. 1976) rehearing denied 532 F. 2d 1375, an action under 42 U.S.C.A. §1983, 1985 and 1986, a county judge, one of several defendants in an allegation of conspiracy to wrongfully condemn a landowner's parcel of property and falsely arrest, imprison and criminally prosecute the landowners, was found to be cloaked with judicial immunity in a per curiam opinion by the Court.

In Gilliland v. Hyder, supra a civil rights action against a trial judge on the grounds that the judge failed to allow a convicted man credit on his sentence for the time spent in jail awaiting trial, it was ruled that no claim was recognized since the fixing of a term



in a penitentiary was a judicial function and the judge was held to be immune from suit.

The immunity of a district justice of the peace was upheld even where unnecessary expense and humiliation resulted from the failure to observe procedural requirements in conducting a probation revocation hearing, Cadena v. Perasso, supra, or in the refusal of a judge of a family division of the Court of Common Pleas to openly and thoroughly investigate and impartially review the charges of improper treatment in a youth study center. Thompson v. Montemuro, supra.

Even in cases where the judge exceeds his jurisdiction, (i.e. he has jurisdiction over the person and the subject matter, but the proper conditions are wanting in a particular case for lawfully invoking it), those judicial acts even if done maliciously are subject

to judicial immunity. Wade v. Bethesda Hospital, 337 F.Supp. 671 (S.D.Oh. 1971), and Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), cert. denied, 96 S.Ct. 1480, 424 U.S. 975, 47 L.Ed.2d 745 (1976).

The doctrine is that firmly established.

IV.

The doctrine of judicial immunity aside, the instant case wherein Petitioner is not threatened with immediate irreparable injury and where there is an ongoing state criminal court process presents the obvious paradox of a federal court granting awards of civil damages for issues still to be resolved by state courts.

The abstention by a federal court on principles of comity as established under Younger v. Harris, 401 U.S. 36, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) mandates that federal courts withhold



adjudication of constitutional issues (in this case judicial rulings) in civil damages suits until disposition of them by state courts. Clark v. Zimmerman, 394 F.Supp. 1166 (M.D.Pa. 1975), Bonner v. Circuit Court of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975) cert. denied 96 S.Ct. 1418, 424 U.S. 946, 47 L.Ed.2d 353, rehearing denied 96 S.Ct. 1525, 425 U.S. 926, 47 L.Ed.2d 773.

CONCLUSION

Respondent Judge Alvarado's acts are clearly within the scope of his jurisdiction. Petitioner's dissatisfaction with those acts, her conclusory allegations of lack of judicial immunity, her suing Respondent Judge Alvarado in his individual capacity, and the tenuous inferences she draws from the state criminal judicial process out of which her complaint arises, are not legally sufficient under any set of facts which

could be averred under the circumstances to state a claim upon which relief can be granted.

As Petitioner addressed her complaint to a limited time frame in a state criminal process -- from the time shortly before arrest through the holding of a preliminary examination -- the reviewing courts had before them the complete Statement of Facts of the Preliminary Hearing (or Examining Trial) as well as a description of the occurrences associated therewith.

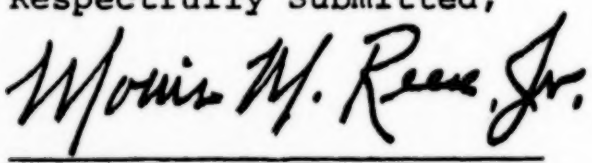
Respondent Judge Alvarado submits that Petitioner's allegations were more in the nature of pretrial criminal discovery and evidentiary objections that could best be presented in the State Criminal Courts.

Respondent A. A. Alvarado's Motion to Dismiss is supported by the long standing doctrine of judicial immunity,



the granting of which motion by the trial court was affirmed by the Court of Appeals for the Fifth Circuit. Accordingly, this Honorable Court should not grant the Petition for Writ of Certiorari to review the judgment of the Court below.

Respectfully Submitted,



MORRIS M. REESE, JR.
FANSLER, REESE & PALACIOS
1800 Victoria Street
Laredo, Texas 78040
(512)723-2986

Attorney for Respondent
A. A. Alvarado

## CERTIFICATE OF SERVICE

I, MORRIS M. REESE, JR., one of the attorneys for A. A. Alvarado, Respondent herein, hereby certify that on the 15TH day of July, 1978, I served copies of the foregoing Memorandum of Law in Opposition to Petition For Writ Of Certiorari, on the Petitioner and Co-Respondents by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys, as follows: J. G. Hornberger, Esq., Attorney for Petitioner, at 915 Victoria, Laredo, Texas 78040; H. C. Hall, III, Esq., Attorney for Respondents Francisco J. Flores, Carlos M. Zaffirini and Arturo Villarreal, at 511 Sames-Moore Building, Laredo, Texas 78040; C. R. Borchers, Esq., Attorney for Respondents C. R. Borchers, Donato Ramos, Steve Whitworth and Sharon Trigo at P. O. Box 1343, Laredo, Texas 78040.

Morris M. Reese, Jr.

MORRIS M. REESE, JR.
Attorney for Respondent
A. A. Alvarado